7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. 6

MARCELLUS THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

FILED SEPTEMBER 26, 1906.

(20,373.)

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No. 105.

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1 THE STATE OF TEXAS:

At terms of the Honorable Court of Criminal Appeals of Texas, begun and holden within and for the State of Texas, and beginning and ending as follows, to-wit: Dallas Term beginning January 1st, 1906, and ending March 31st, 1906; Austin Term beginning April 2nd, 1906, and ending June 29th, 1906—present, Honorable W. L. Davidson, Presiding Judge, and Judges John N. Henderson and M. M. Brooks—the following proceedings on appeal were had in the cause of Marcellus Thomas, appellant, *vs.* The State of Texas, appellee, to-wit:

Caption of Transcript of Court Below.

Caption.

THE STATE OF TEXAS, *County of Harris:*

At a term of the Criminal District Court, begun and holden within and for the County of Harris at Houston on the 4th day of December, A. D. 1905, and which adjourned on the 30th day of December, A. D. 1905—the Honorable J. K. P. Gillaspie, Judge thereof, presiding—the following cause came on for trial, to-wit:

No. 14133.

THE STATE OF TEXAS

vs.

MARCELLUS THOMAS.

Indictment Presented.

THURSDAY, *October 26th,* 1905.

This day the Grand Jury came into open court in a body, a quorum thereof being present, and through their forman delivered to the judge of this court the following bill of indictment, which was thereupon by the court ordered filed and all necessary process to issue thereon, to-wit:

No. 14133.

THE STATE OF TEXAS

vs.

MARCELLUS THOMAS.

Murder 1st Degree.

Minute Book 12, Page 563.

2 *Indictment.*

No. 14133.

THE STATE OF TEXAS

vs.

MARCELLUS THOMAS.

In the name and by the authority of the State of Texas the Grand Jurors, duly and legally drawn, selected, tried, impanelled, sworn and

charged, in the Criminal District Court of the County of Harris and State of Texas, at the October Term thereof, in the year of our Lord one thousand nine hundred and five to inquire in and for the body of said County and State, upon their oaths in said Court, present: That Marcellus Thomas late of the County aforesaid, on the 9th day of the month of October in the year of our Lord one thousand nine hundred and five in the said County of Harris, State of Texas, with force and arms, then and there did unlawfully, with malice aforethought, kill John Blair by shooting him the said John Blair with a gun, against the peace and dignity of the State.

JOHN W. HASKINS,
Foreman of the Grand Jury.

Filed October 26th, 1905.

O. E. REYNAUD,
Clerk Criminal District Court, Harris County,
By C. A. SMITH, *Deputy.*

3 *Arraignment of Defendant.*

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

FRIDAY, *December 22nd*, 1905.

This day the defendant Marcellus Thomas and his Counsel being present in open Court, and the District Attorney also being present in Court, and it appearing to the Court that the defendant had been duly served with a copy of the indictment herein at least two entire days prior to the present day, the Court proceeded to cause the said defendant Marcellus Thomas to be arraigned herein in due form of law, to-wit, the name of the said defendant, as stated in the indictment herein, was distinctly called, and thereupon the indictment herein was read to the said defendant, and he was asked whether he was guilty or not, as therein charged, and the said defendant answered in person that he was not guilty and his said plea of not guilty as charged in said indictment is here now entered of record upon the Minutes of this Court.

Minute Book 12, Page 591.

Verdict and Judgment.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

SATURDAY, *December 23rd*, 1905.

4 This cause was called for trial, on Thursday December 21st, A. D. 1905 and the State appeared by her District At-

torney, and the defendant Marcellus Thomas appeared in person, in open Court his counsel also being present, and the State announced ready for trial, and thereupon came on to be heard the motion of defendant filed herein to quash the indictment in this cause, the Court having heard the said Motion, and the evidence submitted and argument of Counsel the same having been considered by the Court, the said Motion was by the Court in all things refused and overruled, to said ruling and order of the court, the defendant did then and there in open court except.

Then came on to be heard the defendant's motion, filed herein, to quash the special venire herein, the court having heard said motion, also the evidence submitted and argument of counsel and said motion having been considered by the court, is by the court in all things refused and overruled, to which ruling and order of the court the defendant did then and there in open court except.

Then came on to be heard defendant's last application for a continuance of this cause filed herein, the same having been heard and considered by the court, the said application for a continuance by the court in all things refused and overruled, to which ruling and order of the court the defendant, did then and there in open court except and the trial of this cause was proceeded with, and the defendant Marcellus Thomas having been duly arraigned according to law and having pleaded not guilty to the indictment herein, and thereupon a jury to-wit, Ennis Cargill and eleven others was duly selected, impaneled, and sworn according to law who having heard the indictment read, and the defndant's plea of not guilty thereto and having heard the evidence submitted and having been duly charged by the court, on Saturday December 23rd 1905 retired in charge of the proper officer to consider of their verdict, and afterward on the same day Saturday, December 23rd, 1905, were brought into open court by the proper officer, the defendant being present, and in due form of law returned into open court the following verdict, which was received by the court, and is here now entered upon the Minutes of the court, to-wit:

"We, the jury find the Defendant Marcellus Thomas guilty of Murder in the first degree and assess his punishment at Death.

ENNIS CARGILL, *Foreman.*

December 23rd, 1905."

It is therefore considered and adjudged by the court that the defendant Marcellus Thomas is guilty of Murder in the First degree, as found by the jury, and that he be punished as has been determined by the jury, that is, with death, and that he be remanded to jail to await the further order of this court herein.

Minute Book 12, Page- 593 & 594.

Charge of Court.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Instructions to the Jury.

By the Law of this State Murder is thus defined Every
6 person of a sound memory, and discretion, who shall unlawfully kill any reasonable creature in being, in this State, with Malice aforethought, either express or implied, shall be deemed guilty of Murder.

Murder committed with express Malice is Murder of the first degree and Murder committed with implied Malice is Murder of the second degree.

Malice aforethought, in its legal sense, means the intentional and voluntary doing of a wrongful and unlawful act, by a person of sound memory and discretion, with the intent means and ability to accomplish the reasonable Natural and probable consequences of such act and in a manner showing a heart regardless of social duty and fataliy bent on mischief. Malice is said to be express when the evidence shows, beyond a reasonable doubt, from the facts and circumstances in evidence transpiring either before, at the time of or after a killing that the slayer acted with a sedate, deliberate mind and a formed design unlawfully to kill the person slain; and express malice must be proved by the evidence, to the satisfaction of the jury beyond a reasonable doubt but it is not material for how long it existed.

Implied Malice aforethought is, that which the law infers from or imputes to certain acts; thus, where the fact of an unlawful killing is established by the evidence to the satisfaction of the jury beyond a reasonable doubt, and there are no facts or circumstances in evidence which establishes the existence of express Malice, beyond a reasonable doubt, nor which tends to mitigate, excuse or justify the act, then the law implies Malice and the killing would be Murder of the second degree. By the terms "Mitigate, excuse or justify, is
meant any facts or circumstances which would tend to or
7 would reduce the offense or excuse or justify the act done.

If you believe from the evidence beyond a reasonable doubt that in Harris County, Texas, the defendant Marcellus Thomas, on or about the 9th day of October, A. D. 1905, did unlawfully and acting with express Malice aforethought, that is, with a sedate, deliberate Mind and a formed design*ed* unlawfully to kill John Blair, shoot said John Blair with a gun and then and there by said means killed him the said John Blair, and that the said gun was then and there a deadly weapon, that is, as used was calculated reasonably and probably to kill then find him the said Marcellus

Thomas, the defendant guilty of Murder in the First Degree and assess his punishment at Death or by confinement in the State Penitentiary for Life.

If the evidence does not satisfy you beyond a reasonable doubt that the defendant Marcellus Thomas acted with express malice aforethought, that is, with a sedate, deliberate mind and a formed design unlawfully to kill John Blair, then you cannot convict him of murder in the first degree, but if you do believe from the evidence beyond a reasonable doubt that in Harris County, Texas, on or about the 9th day of October A. D. 1905, the defendant Marcellus Thomas, acting with implied malice aforethought, as that expression has been herein defined and explained did unlawfully shoot and kill said John Blair, with a gun, and that said gun was then and there a deadly weapon, that is, as used was calculated reasonably and probably to kill then find him the said defendant Marcellus Thomas, guilty of murder in the second degree and assess his punishment by confinement in the State Penitentiary for any term of years not less than five. If you should find that said defendant Marcellus Thomas did shoot and kill said John Blair, with
8 a gun, but you should determine from the evidence that he is not guilty of murder in either degree, then you will, from the facts and circumstances in evidence, consider whether or not he be guilty of manslaughter.

Manslaughter is voluntary homicide, committed under the influence of sudden passion, arising from an adequate cause, but neither excused or justified by law. By the expression "Under the immediate influence of sudden passion," is meant:

(1) The provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation.

(2) The act must be directly caused by the passion arising out of the provocation, and not provocation given by some other person than the party killed.

(3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Any condition or circumstance which is capable of creating and does create sudden passion, such as rage, anger, sudden resentment or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause. And where there are several causes to arrouse passion, although no one of them alone would constitute adequate cause, it is for you to determine whether or not all such causes combined might be sufficient to do so. Insulting words and gestures, or an assault an- battery so slight as to show no intention to inflict pain or injury are not adequate causes.

In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to, that is, of anger, rage, sudden resentment or terror, sufficient to render the mind incapable
9 of cool reflection, but that also that such state of mind did actually exist at the time of the commission of the offense.

Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty in determining the adequacy of the provocation (if any) to consider in connection therewith all the facts and circumstances in evidence in the case, and if you find by reason thereof, the defendant's mind was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind, in a person of ordinary temper, then the proof of sufficiency of the provocation satisfies the requirements of the law, so in this case you will consider all the facts and circumstances in evidence, the threats, if any, past conduct, and bearing of the parties, and all the facts and circumstances transpiring before, at the time of, and after the homicide, in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition. If you believe from the evidence beyond a reasonable doubt, that the defendant Marcellus Thomas, with gun, a deadly weapon, which as used was reasonably calculated and likely to kill or to produce death, in a sudden transport of passion arroused by adequate cause, as the same is herein explained and not in self defense and against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, did shoot and kill John Blair, as charged in the indictment, you will find the said defendant Marcellus Thomas, guilty of manslaughter and assess his punishment by confinement in the State Penitentiary for not less than two nor more than five years.

Should you find the defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter, you will state in your verdict of which offense you so find him guilty and affix the punishment as herein directed.

If from the evidence you are satisfied beyond a reasonable doubt, that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express malice or implied malice, then you must give the defendant the benefit of such doubt, and not find him guilty of a higher degree of murder than murder in the second degree. Or if from the evidence you believe, beyond a reasonable doubt, that the defendant is guilty of some grade of culpable homicide, but you have a reasonable doubt, whether the offense if any, is murder or manslaughter, then you must give the defendant the benefit of the doubt, and in such case if you find him guilty it could not be of a higher grade of offense than manslaughter.

If you do not find beyond a reasonable doubt that the defendant unlawfully killed said John Blair then you will return a verdict of not guilty.

The defendant would be justified in killing deceased if he acted upon reasonable appearances of danger of death or serious bodily injury to himself, which reasonable appearances are to be considered and determined from defendant's standpoint. It makes no difference in such case, whether the danger was real, or not, if from defendant's stand-point, taking into consideration all the facts and circumstances of the case, it reasonably appeared to him that he was in danger of death or serious bodily injury from the deceased,

he had the right to kill him, though in fact such danger did not exist. The jury must judge the defendant from his position and stand point and thereby determine from all the facts and
11 circumstances in evidence, as they reasonably appeared to him at the time, whether his apprehension of death or serious bodily injury was reasonable, and if so, then find him not guilty.

Defendant, if threatened by either actual or apparent danger would not be bound to retreat to avoid the necessity of killing his antagonist, and where there is more than one assailant, the slayer has a right to act upon the hostile demonstrations of either one of them and to kill either or both of them if it reasonably appeared to him that they were present, acting together, to take his life, or to do him serious bodily injury.

And if you believe that at the time the defendant fired the fatal shot, which killed the deceased, it then reasonably appeared to him that he the deceased, alone or acting with one Ben Shropshire was making an attack on him, under circumstances which reasonably indicated an intention to kill or seriously injure him, the defendant and if said attack was so made and either deceased or said Shropshire, either or both, were then armed with a pistol or knife, one or both, and the same were calculated reasonably and probably to kill then the law would presume that the deceased intended to murder him the said defendant, or to do him serious injury.

If defendant killed John Blair, but at the time he did so it reasonably appeared to him, viewed from his stand point, that he was attacked or about to be attacked by John Blair or Ben Shropshire, either or both, with a pistol or knife, either or both, and it then and there reasonably appeared to him the said defendant that said Blair and Shropshire were present and acting together to take his life, or do him serious bodily injury, then and in that event he the said defendant would have the right to kill either or both, or if
12 he acted upon a reasonable apprehension or fear of death or serious bodily injury from John Blair then he would be justified, and if attacked he would not be bound to retreat to avoid killing said Blair and he would have the right to act so long as the danger was apparent to him.

You will consider alone the alleged killing of John Blair and in doing so you will not take into consideration the alleged killing of Ben Shropshire, in determining whether or not the guilt of defendant in this case is established. No statement made by one under arrest can be used against him unless before he made the same he was warned that the same could or would be used in evidence against him and was wholly voluntary; and you are instructed that if you find the defendant made a statement to one J. L. Townsend, as testified to by him, you will not consider the same unless you find he was first warned and was voluntarily made by him the said defendant.

The defendant is presumed to be innocent until his guilt is established by legal evidence to the satisfaction of the jury beyond a reasonable doubt, and in case you have a reasonable doubt of the defendant's guilt, you will find him not guilty.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to the testimony, and by your conclusions thereon, guided by the law as given you in charge you will determine your verdict and which, in no event should be the result of lot or chance.

J. K. P. GILLASPIE, *Judge.*

Filed Decemeber 23rd, 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

13 *Orignal Transcript of Testimony on Defendant's Motion to Quash the Indictment and Venire.*

Defendant's Bill of Exception.

In the Criminal District Court of Harris County, Texas, December Term.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Bill of Exceptions and Testimony on Hearing of Defendant's Motion to Quash the Indictment and the Special Venire.

Be it remembered that upon the 21st day of December 1905, this cause came in for hearing upon the defendant's motion to quash the indictment and the defendant's motion to quash the special venire in the above entitled and numbered cause, which said motions were by agreement of counsel for the State and the defendant, with the approval of the Court, heard together with the agreement and understanding with the testimony introduced and heard upon said hearing should be heard and considered upon each of said motion- the same as if it had been introduced upon the hearing of each of said motion- separately, and the following testimony was introduced and given thereon;

In the Criminal District Court of Harris County, Texas, December Term, 1905.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Testimony on the Defendant's motion to Quash the Venire.

Be it remembered that upon the defendant's motion to quash the venire, which motion was head in the above styled Court on the 20th day of December, 1905, the following was the testi-
14 mony given:

J. W. HASKINS, a witness called by the defendant, first duly sworn testified:

Ques. Mr. Haskins, do you remember the October Grand Jury, during the October Term of this Court?
Ans. Yes, sir.
Ques. Were you a member of that Grand Jury?
Ans. Yes sir.
Ques. You were the foreman of that Grand Jury, were you not?
Ans. Yes sir.
Ques. Is this — signature as foreman of that grand jury to the indictment against the defendant in this case?
Ans. Yes sir.
Ques. I will ask you to state whether or not the defendant, Marcellus Thomas, was brought before that grand jury, or given any opportunity to appear before the grand jury, either within the grand jury room or court room to challenge the array of the grand jury or the formation of the grand jury, either in person or by counsel?
Ans. No sir, he was not present at all; we did not ask him anything; he was not present by counsel or otherwise.
Ques. He wasn't brought before the grand jury?
Ans. No sir.
Ques. When was the grand jury impaneled?
Ans. I think on the 3rd of October, that is my impression about it.
Ques. The indictment was returned into this court on the 26th of October?
Ans. Yes sir.

Cross-examination:

Ques. No request was made to be present, either by the defendant or counsel?
Ans. No sir.
Ques. Were there any colored man on that grand jury?
Ans. There was one colored man on that grand jury.

Ques. Was there more than one?
Ans. No sir, only one.
Ques. There were twelve members of that grand jury?
Ans. Yes sir.

15 A. R. ANDERSON (sheriff of Harris county), called by the defendant as a witness, first duly sworn, testified as follows:

Ques. Your name is A. R. Anderson?
Ans. Yes sir.
Ques. You are sheriff of Harris County, Texas?
Ans. Yes sir.
Ques. How long have you been sheriff of this county?
Ans. About seven years.
Ques. Mr. Anderson, you may state to the court, approximately, the population of Harris County?
Ans. I suppose it is about 80,000 or 90,000.
Ques. What proportion of that population are negroes or colored persons of African descent?
Ans. I don't know; Can't hardly say.
Ques. What is your best judgment about it?
Ans. About 10 or 12 per cent.
Ques. 10 or 12 per cent.; as a matter of fact ain't it from 25 to 30 per cent.?

(Counsel for STATE: I object to counsel leading the witness.)

Ques. Do you know how many voters there are in Harris County—approximately?
Ans. Why, I suppose about 12,000.
Ques. 12,000?
Ans. About.
Ques. How many of those voters are negroes or persons of African descent approximately?
Ans. Why, I suppose about 8 or 10 per cent.
Ques. 8 or 10 per cent.?
Ans. Approximately.
Ques. How many negro voters are there in this county, as far as you can tell; you have been in the county for some time, you ought to know the number of those voters?
Ans. I think—Well, I suppose about 8 or 10 per cent.
Ques. Do you remember the number of voters who have paid their poll tax, and were qualified to vote in 1904?
16 Ans. I don't know exactly; don't know as I ever made an estimate of it.
Ques. I will ask you if your were not a candidate for sheriff at that time?
Ans. Yes, sir.
Ques. I will ask you if you didn't make an estimate of the votes, the legal voters, qualified voters at that time—black and white?
Ans. No, sir, not particularly.
Ques. I will ask you if you are not acquainted with the custom of the dominant party in this county for the past 8 or 10 years

with reference to the admission of negroes or persons of African descent to participate in its primary elections?

(Objected to by counsel for State, because immaterial, and not a proper matter of inquiry in this case. Objection sustained.)

Mr. ALLEN, counsel for defendant: I wish to call the attention of the court to the allegation in the motion along that line——

The COURT: That is not a material inquiry; it is not a proper subject of inquiry by this court.

Mr. ALLEN: We offer to make the proof, so as to get it in the record. We offer to show by this witness that the dominant party in which candidates are nominated, selected and elected, have for years past excluded negroes or persons of African descent from participating in their primary elections for nominations of such officers.

The COURT: I don't think that it is a proper inquiry in this case.

Mr. ALLEN: The defendant excepts to the ruling of the court.

17 Ques. Mr. Anderson, are you familiar with the practice of the courts; or do you know whether or not there has been any negro selected by the jury commissioners of the three civil district courts and county court of Harris County, a negro selected on the jury in either of those courts, for the past 8 or 10 years?

Ans. Not that I know of.

(Objected to by counsel for the State, because not a proper enquiry in this court.

The COURT: I don't know whether Mr. Anderson knows that as a fact or not.

Ques. I will ask you whether you have been acquainted with, or have known of jury commissioners for the civil district courts or county court, selecting a negro on a jury for the past 5, 6 or 7 years?

Ans. No, sir.

Ques. Do you know of any negroes having been appointed in either of those courts as jury commissioners?

Ans. No, sir.

Ques. Do you know of any negroes having been drawn to serve as jurors in either of those courts for the past 5, 6, or 7 years?

Ans. I could not say, I don't whether they have or not.

Ques. As sheriff of the county do you know whether any have been served, or drawn as jurors by you as sheriff in either of said courts for the past 5, 6 or 7 years?

Ans. I think not.

Ques. Do you know of any negroes having been appointed as jury commissioners in the Criminal District of this county in the past 5, 6 or 7 years; has there ever been a negro jury commissioner in this court, that you know of?

Ans. No, sir, not that I know of.

Ques. How many negroes have served on grand juries in the

Criminal District Court in this county since you have been
18 sheriff?

Ans. Well, I could not say how many; I have known of one in this court.

Ques. Has there ever been more than one negro on a grand jury at one time since you have been sheriff?

Ans. Not that I recollect of.

Ques. How many negroes have been drawn and served upon juries in the Criminal District Court of this county at any one term since you have been in a position to know—up to the present time?

Ans. Well, I could not say; I think there have been two or three, as many as two, anyhow.

Ques. Have you ever known of more than two?

Ans. Well, possibly, I have, I could not say for sure, but it is possible we have had more than two.

Ques. Have you ever had as many as six?

Ans. No, sir.

Ques. At any one time?

Ans. No, sir.

Ques. Do you know how many there has been—negroes on the jury—drawn and served on jury in the Criminal District Court for each week of the term, for the last 2, 3, or 4 or 5 years?

Ans. Well, my recollection is there has been at least one on the jury for each week—that is my recollection.

Ques. No more than one, has there?

Ans. Well, I could not say positively; I think possibly there has.

Ques. I will ask you if you are familiar with the practice in the District Courts prior to 1900, or prior to the time of the trial of the Whitney case?

Ans. Yes, sir.

Ques. Had any jurors—negro jurors—served—I mean in this court—prior to that time, that you know of?

Ans. I think not.

19 Ques. For how long prior?

Ans. Well, I could not say; I have not looked the matter up.

Ques. Had there been any negroes drawn on the grand jury prior to that time.

Ans. No sir, not that I know of, not to my knowledge. I don't know, though; possibly there had been.

Ques. Since that time there has been drawn one negro on the grand pury each term—since then?

Ans. Yes sir.

Ques. But not to exceed one at any one time?

Ans. No sir.

Ques. Any negroes on the grand jury for this term?

Ans. Yes sir, there was one on the last one.

Ques. He is not served, is he?

Ans. I don't know sir.

Ques. Well, has the jury commissioners drawn any negroes on the special venires for the several terms?

Ans. Yes sir.

Ques. What is the greatest number that has ever been drawn on special venires now?

Ans. Well, I could not say exactly; I don't know.

Ques. Has there been more than three or four at any one time?

Ans. No sir, I think not.

Ques. You know it is a fact that the jury commissioners have drawn as high as 100 and more special veniremen, have they not?

Ans. Yes sir.

Ques. Do you know whether or not any negroes are on the special venire drawn in this case?

Ans. I could not say for certain whether there has or not.

Ques. Who served the process in this case?

Ans. One of my deputies.

Ques. There were 60 veniremen drawn in this case—special veniremen?

Ans. Yes sir.

Ques. Do you know whether there has been a single negro served for the special venire drawn in this case?

Ans. I could not say of my own knowledge whether there has been one or not, possibly there has.

Ques. Can you tell by looking over your list?

Ans. I don't know whether I could or not; if they are marked "colored" I could.

Ques. Do you know Mr. T. A. Andrews?

Ans. T. A. Andrews? Yes sir, I know him, I think he is a colored man.

Ques. Sure of it?

Ans. I am not sure of it. I know one Andrews who was in here yesterday and spoke to me about being on the special venire; he is a colored man.

(Counsel for defendant read from a list of names in his hand the names of 59 men, and asked witness whether they were white or colored, and witness answered they were white.)

Ques. On this list they are all white men except Mr. Andrews and you are not certain about him?

Ans. I think he is a colored man.

By STATE'S COUNSEL:

Ques. One colored man was served on the special venire, was there?

Ans. Yes sir. One Andrews, who was here yesterday. He was a colored man.

By DEFENDANT'S COUNSEL:

Ques. You don't know whether he is on this venire or not?

Ans. No sir.

Ques. There is another special venire in the other case against this same defendant; do you know whether there are any white men on this special venire—I mean any colored men?

Ans. I don't know.

Ques. You can't say whether there are any colored men on there or not?

Ans. No sir.

21 (Here counsel for the defendant read the list of names, and asked witness whether they were colored or white men, and witness answered they were white men.)

Ques. All on this list are white?

Ans. Yes sir.

Ques. This is the special venire in the case #14,134?

Ans. Yes sir.

Cross-examination:

Ques. Mr. Anderson, you don't know that any jurors of the colored or African race were excluded from the grand jury or petit jury because of their race, do you?

Ans. No sir.

Ques. You have not undertaken, and don't undertake to state anything about why they don't happen to be on the list?

Ans. No sir.

Ques. Now, Mr. Anderson, is it not a fact, that by far the greater portion of the men who are apparently qualified as jurors in this county, are white men?

Ans. Yes sir.

Ques. Now, Mr. Anderson, in stating the population of this county, you put it at about 90,000. Does that include men, women and children?

Ans. Yes sir, everybody.

Ques. 8 or 10 per cent. of them are negroes?

Ans. Yes sir.

Ques. That also included men, woman and children?

Ans. Yes sir.

Ques. Now, Mr. Anderson, for years before you was an officer you worked here in the shops?

Ans. Yes sir.

Ques. In the railroad shops?

Ans. Yes sir.

Ques. Your knowledge is obtained from your acquaintance as a citizen, but officially as Marshal of this town, as Deputy Sheriff and as Sheriff of this county?

Ans. Yes sir.

Ques. Now, is it not a fact that a large per cent. of the negroes you know are illiterate, and not able to read and write?

Ans. Yes sir. A great many of them.

22 Ques. Are you able today to fix the percentage of those who are disqualified as jurors on that ground?

Ans. No sir. It would be a pretty hard matter to do.

Ques. Now, is it not a further fact, Mr. Anderson, that until very recently when the white people have provided them with the means of education, a very few of them were educated?

Ans. Yes sir.

Ques. They have not been left to themselves to provide means of education, but the white people have provided schools for them, and before that, they were not very generally educated?

Ans. Yes sir.

Ques. Then again, Mr. Anderson, is it not a fact that a great majority a very large percentage of the negro population are not freeholders, and don't own their own homes?

Ans. Yes sir, a great majority are not freeholders.

Ques. You could not say how many of them are householders, and qualified on that ground?

Ans. No sir.

Ques. Well, you don't mean to say then that any court in this county has ever failed to appoint a negro a jury commissioner because of a desire to discriminate against him?

Ans. No sir.

Ques. Nor do you mean to say that the jury commissioners in drawing the grand juries have at any time put on or left off any body because of their race or color?

Ans. No sir.

Ques. Nor do you mean to say Mr. Anderson, that the commissioners who drew this special venire excluded anybody because of their race or color?

Ans. No sir.

Ques. Is it not a fact that they did include some who are negroes?

Ans. Yes sir, they included some.

Ques. Now, do you know how many were drawn of the entire list?

Ans. Out of the whole 600?

Ques. Out of that 600 drawn, from which you put the names in the box, and shook it up, and drew out these 75, you don't know how many were negroes?

Ans. No sir, I have no way of knowing, because I have not seen the list.

Ques. One negro in connection with this case, came to you and wanted to be excused as a juror?

Ans. Well, yes, he came in to find out if he was on the venire.

Ques. Now, with reference to when negroes began to be put on the grand jury, ain't you mistaken about that; was it not long prior to the Whitney case; was it not since the Carter case in Galveston.

Ans. I think that was 2 or 3 years prior; it has been some time, and from memory I don't recollect the exact time when it was, but several years; I don't know how long, could not say for sure.

Ques. In the case tried in 1901; do you remember the Carter case some seven years back?

Ans. Yes sir, it was some time back, I could not say exactly.

Ques. Now in reference to negroes who are on the juries here—the number of them—do you know or have you taken occasion to examine as to the number that have been drawn for each week for the past 6 or 7 years?

Ans. The number of negroes serving?

Ans. I don't mean those actually serving, but those drawn by the jury commissioners?

Ans. No sir, I have not paid much attention to it, I know they have some in the civil district courts, but I have not paid much attention — the number.

Ques. Sometimes as many as two or three?

Ans. Yes sir, I could not say exactly how many, but I know their names are drawn.

Ques. Well, you always summons negroes along with whites whenever they are drawn don't you?

Ans. Yes sir.

24 Ques. Now Mr. Anderson, is it not a fact that in this court of the jury empaneled for the week sometimes there are three negroes of the 28 to 30, usually empaneled—approximately?

Ans. Yes sir Yes sir.

Ques. Then the number of negroes empaneled pretty nearly represent the proportion of the negro and white population?

Ans. Yes sir, I think so.

Ques. So that the number of negroes that serve on juries about represent the proportion of the negroes who are qualified for jury service, with reference to the whites?

Ans. Yes sir.

Further Direct Examination:

Ques. One out of 60 would be the proportion, you think?

Ans. Well, I don't know about that.

Ques. You think you have 60 qualified white jurors and one qualified negro juror in this county, do you?

Ans. Well, I don't know about that; I have never figured it up.

Ques. Mr. Anderson, how many terms of the civil district courts and county courts have we in this county?

Ans. Civil Courts?

Ques. Yes sir?

Ans. I think we have six terms.

Ques. We have three civil district courts and one county court?

Ans. Yes sir.

Ques. How many weeks are there per term, or, approximately how much time is consumed in the trial of jury cases—about how many weeks to the term?

Ans. About four weeks.

Ques. About four weeks, jury weeks; and a special jury is drawn for each week, is there not?

Ans. Yes sir.

Ques. And in none of those courts for the last 8 or 10 years have there been any negroes drawn or served on juries, in

25 any of them?

Ans. Not that I know of.

Ques. A good many negroes are tax payers, are they not?

Ans. Yes sir.

Ques. The fact is, they maintain public schools?

Ans. Yes sir.

H. ALBRECHT, called by the defendant as a witness, first duly sworn, testified as follows:

Ques. What official position do you hold, if any?
Ans. Clerk of the district courts.
Ques. How long have you been clerk of the district court?
Ans. About three years.
Ques. How many district courts are there in this county—civil?
Ans. Three.
Ques. And one county court?
Ans. And one county court.
Ques. You have been clerk for three years?
Ans. Yes sir.
Ques. State whether or not during that time, during the time you have served as clerk of the district court, there has been any negro appointed upon the jury commission in either of the respective courts, that you know of?
Ans. No sir, none.
Ques. Were you familiar with the practice in those courts prior to that time?
Ans. I was.
Ques. How long had you been intimately acquainted with the practice?
Ans. For several years.
Ques. Have there been any negroes appointed as jury commissioners prior to that time?
Ans. No sir.
Ques. During the time you have been clerk of the courts has there been any negroes drawn and served on juries in either of those courts?
26 Ans. No sir, not that I know of.
Ques. You would know it, if there had, wouldn't you?
Ans. Yes sir, I probably would.
Ques. Are you acquainted with the population of this county?
Ans. I don't know as I am.
Ques. You are some in politics, ain't you?
Ans. Yes sir.
Ques. You have a general idea as to the population, haven't you?
Ans. Yes sir.
Ques. What is your judgment of the population of Harris County?
Ans. I should think about 90,000.
Ques. What is the negro population?
Ans. I suppose the negro population is about from 15,000 to 25,000.
Ques. Fifteen to twenty-five thousand negro population?
Ans. As to the negroes themselves; I don't know that population, as far as the negroes are concerned, am not acquainted with it.
Ques. You know generally the negro population?
Ans. Yes sir.
Ques. I mean the population of the county?

Ans. I don't know it with reference to the whites.

Ques. Do you or not have any idea of the number of voters in the county—the total number of voters?

Ans. The total number of voters?

Ques. Qualified voters, I mean?

Ans. Qualified voters, about 12,000 to 15,000.

Ques. What proportion or percentage of those are negroes, in your judgment?

Ans. About 10 per cent.

Ques. About 10 per cent.?

Ans. Yes sir.

Ques. What percentage of them are qualified voters—I
27 mean qualified jurors?

Ans. Well, I could not say about that.

Ques. Do you know of any business men—any negroes, in the city in various lines of business?

Ans. Yes sir.

Ques. Have you any idea of the number?

Ans. No sir, I don't, I could not tell you, there is only one that I know of in business as a merchant.

Ques. They mostly are in barber shops.

Ans. In barber shops, yes sir.

Ques. A great many of them?

Ans. Yes sir, there are probably a half dozen of them.

Cross-examination:

Ques. You say you have been clerk three years?

Ans. Yes sir.

Ques. Now, you were asked about negroes being appointed as jury commissioners; are you prepared to say that any more of them in this county have the qualifications for jurors?

Ans. No sir.

Ques. You don't know of any more?

Ans. No sir.

Ques. You know of a number of white men, do you not, all through the county, who are much better qualified?

Ans. Yes sir I do.

Ques. I understand you to say Mr. Albrecht, that you have no way of knowing, and have no knowledge of the number of negroes living outside of the city, in the county?

Ans. No sir.

Ques. You estimate the population at what?

Ans. 2,500—in the city.

Ques. You mean the negro population?

Ans. Yes sir.

Ques. In the city?

Ans. Yes sir.

Ques. You don't know what proportion of the negro vote (as stated by Judge Allen)—of the negro voters are qualified jurors; that means those who are householders or free holders. Those
28 who have not been convicted of crime, not under indictment for crime, and the various things that disqualify them for

jurors; you don't know how many per cent. of them are qualified jurors?

Ans. No sir.

Ques. You don't know how many of them are illiterate? can't read or write?

Ans. No sir, I have not come into contact with them enough to know.

Ques. From those you do know, is it not a fact, Mr. Albrecht that a very small percentage or portion of the negroes you know have the requisite intelligence, and moral character required for jurors?

Ans. Yes sir.

Ques. A very small percentage of them?

Ans. Yes sir.

Ques. You are speaking in your testimony of jury commissioners selected with reference to the court in which you act?

Ans. Yes sir.

Ques. That is in the civil district courts?

Ans. Yes sir.

Ques. In which there is no criminal jurisdiction?

Ans. No sir none whatever.

Ques. And in which the percentage represented by negroes is very small?

Ans. Yes sir.

Ques. They figure principally in divorce suits, and in that kind of litigation?

Ans. Yes sir.

Further Direct Examination:

Ques. I will ask you whether or not you know of any sentiment in the county with reference to negroes serving upon juries whether it is in favor of them or against them?

Ans. No sir, I cannot say——

29 The COURT: That don't make any difference as to sentiment; it is not a proper inquiry.

B. R. LATHAM, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is B. R. Latham?

Ans. Yes sir.

Ques. You reside in this city, Mr. Latham?

Ans. Yes sir.

Ques. How long have you lived in this city and Harris County?

Ans. I was born and raised here—41 years next——

Ques. Have you ever served as jury commissioner in any court in this co., if so, when, and for how long?

Ans. Well, yes about 5 years ago.

Ques. In what court?

Ans. In this court.

Ques. Did you ever serve more than one term?

Ans. No sir.

Ques. Do you remember the exact year you served?

Ans. No sir, but I think about 5 years ago nearly.

Ques. Do you remember testifying in this court in a case along about the time you was jury commissioner?

Ans. Yes sir.

Ques. I will ask you what the practice was when you were a jury commissioner with reference to placing negroes on the grand and petit juries?

Ans. I could not say, it has been 5 years since I served, and I don't know what the practice has been.

Ques. Did you place any negroes upon the jury when you were a commissioner?

Ans. Yes sir I did.

Ques. Do you remember testifying in the —— case?

(Objected to by the State's Counsel.)

Ans. I may have; I don't remember it.

Ques. Do you remember whether any negroes were drawn at all while you were on the commission by the jury commissioners?

Ans. I could not say. It has been so long ago, I could not say; I have forgotten.

Ques. If you had drawn any negroes, would you have put them on the jury at that time?

Ans. Yes sir, I would.

Ques. You would?

Ans. Yes sir.

Ques. You don't know whether any were drawn or not?

Ans. No sir, I could not say.

Cross-examination:

Ques. Jury Commissioners only serve for one term?

Ans. Yes sir.

Ques. You were one of the jury commissioners appointed for that term by the court?

Ans. That is my understanding of it.

Ques. Is it not a fact that you did not discriminate against negroes in your service?

Ans. No sir, we did not.

J. H. ROTHWELL, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Where do you live?

Ans. 1201 Noble St.

Ques. Were you one of the jury commissioners in this court at the October term?

Ans. Yes sir.

Ques. And one of the commissioners who drew the grand jury for the term?

Ans. Yes sir.

Ques. State how many negroes were drawn and placed upon the grand jury for that term?

Ans. I remember of one.

Ques. Do you know how many were drawn for the petit jury?
Ans. One for each week.
31 Ques. Why was there but one drawn for each week?
Ans. Well, we had so many to draw from who had never served before; and we had to put at least one negro on according to law.
Ques. You just put one negro on because you thought it was the law?
Ans. Yes, sir, one for each week.
Ques. Did you draw more than one negro; or, what do you mean; did you find more than one negro and put somebody else on without cause?
Ans. No, sir; we took the list and took some off from that, and some we didn't take off the tax list.
Ques. Some you took off the tax list, and some you didn't?
Ans. Well, we took those qualified, those who had paid their poll tax.
Ques. Did you take the one negro off the tax list or some other source?
Ans. Well, the tax list, and our knowledge of them.
Ques. Well, I say, did you take the negro from some other source than the tax list?
Ans. Well, from the tax list, and also knowing of them personally.
Ques. Were there any other negroes whose names were considered by you and left off at the time?
Ans. No, sir, I don't remember of any.
Ques. How did you determine whether they were qualified or not?
Ans. Well, one or the other of the jury commissioners knew the negroes, and we put them on when we knew they were qualified.
Ques. Did you know all the negroes by their names?
Ans. No, sir, I didn't know them all by their names, but we went by the list, and one of us would know when they were
32 qualified.
Ques. When you came to one name to put on for one week, you all knew him, did you?
Ans. Well, I don't know about that, I say I didn't know each one of them; I didn't know them all; but one of us would know them.
Ques. How did it happen you just got one negro for each week; that is, you only found one negro name in the list or in the batch of names you drew from each week?
Ans. How did it happen?
Ques. Yes, sir?
Ans. Well, just as soon as we come to them, sometimes we considered two or more.
Ques. Did you ever put more than one on any time for any week?
Ans. No, sir, I didn't; I only served but one term.
Ques. Why did you only put one for the grand jury?
Ans. Well, we had more white men that we wanted on.
Ques. You just left the negroes off in order to put on white men?
Ans. No, sir, we just took the whole batch together, what we had on hand.

Ques. You say you left off negroes because you had so many white men who wanted on?

Ans. I say we had too many white men who wanted to get on; but whenever we came across negroes we thought good men, we put them on.

Ques. You know whether a negro is a good man or not, do you?

Ans. Yes, sir.

Ques. Did you consider any of them good men for jury service?

Ans. Yes, sir, I did.

Ques. How many did you consider that time with reference to the grand jury?

Ans. Well, we considered a number, don't know how many; but we agreed to put one on the petit jury.

33 Ques. You considered two and more, and agreed to put one on the grand jury and one on the petit jury; why, if you had so many white men, did you put on any negroes?

Ans. Well, according to law, and the way the judge charged us, we must put on colored men.

Ques. Did the judge charge you to put on but one colored man on each jury?

Ans. No, sir, he did not, he said to put colored men on the jury.

Ques. In the selection you made from the names considered, when you found you had enough, so you put one negro on the *the* jury for the week and one on the grand jury?

Ans. Yes, sir.

Ques. And having discussed the matter of the negroes names you made your selection?

Ans. Yes, sir, qualified; and we considered one for the grand jury, and one for the jury each week.

Ques. Did you take the names out of a box?

Ans. No, we didn't have any box.

Ques. What did you take them from?

Ans. We took them from the list, the poll tax list and the tax roll.

Ques. Well, I say, in going over the tax list did you consider whether they were white or colored?

Ans. No, sir, we didn't consider that at all.

Ques. Did you take them in their order, or just skip from place to place on the tax list?

Ans. No, sir, they were scattered all over the county.

Ques. You didn't jump from one white man to the other and skip the negro?

Ans. No, sir, we considered the names on the book; we just wanted enough and didn't want any others at all.

34 Ques. You didn't want any more than just enough to comply with the law, is that it?

Ans. No, we had no objection to negroes being put on there.

Ques. I asked you if you didn't want others, or merely enough to comply with the law, if that wasn't your purpose and idea?

Ans. No sir, that wasn't the idea, as I stated before, we had so

many white men, and we wanted enough to serve on the juries, and we had enough without the negroes, but we put them on.

Ques. So you gave them the preference to the negroes?

Ans. No sir, there wasn't any preference, that wasn't considered at all.

Ques. You didn't consider the negroes at all?

Ans. Yes sir, we considered we had to put some on.

Ques. You didn't see any more negroes on the list, did you?

Ans. I saw quite a number on the list.

Ques. You made the list from the 1 tax list, you say?

Ans. Yes sir.

Ques. Did you see other negroes on there—on the tax list?

Ans. I saw some I knew, and others I didn't know.

Ques. Some you knew, and some you didn't know; you didn't investigate, whether they were qualified to serve or not?

Ans. No sir; when I remembered a man I knew was qualified, we put him on.

Ques. You didn't take him off the tax list then?

Ans. Yes sir, I knew it from the list.

Ques. Do you know how many qualified voters there are in the county?

Ans. No sir, I could not say how many there are.

Ques. Well, do you know how many qualified negro voters there are?

Ans. No sir, I haven't any idea.

35 Ques. You haven't any idea?

Ans. No.

Cross-examination:

Ques. You were instructed by the judge before you entered upon your duties, were you not?

Ans. Yes sir, we were.

Ques. You were instructed, were you not, not to discriminate against any race or color?

Ans. Yes sir, not to discriminate against any race or color.

Ques. Or any nationality?

Ans. Or any nationality.

Ques. Neither German, Irish, American, negroes, and to consider everybody alike?

Ans. Yes sir.

Ques. Now, in designating the different jurors from the county, you knew a good many white men had not been doing jury service, and you wanted to put them on so as to divide up the jury service with those who had been drawn previously?

Ans. Yes sir.

Ques. In considering the names, you found only a very — names among the negroes who were qualified?

Ans. Yes sir, both colored and white men we knew to be qualified.

Ques. The negroes you knew to be qualified, you put on, and you put on only those you knew to be qualified?

Ans. Yes sir.

Ques. You put on one for each week?

Ans. Yes sir.

Ques. Did you leave a single negro off simply because he was a negro?

Ans. I did not.

Ques. In selecting the grand jury your purpose was, was it not to get only what you considered the best intelligence, the best moral character and fitness for jury service without regard to race
36 or color?

Ans. Yes sir, that is what I tried to do.

Ques. If the negroes had represented the best intelligence the best moral character and fitness, you would have put more of them on?

Ans. Yes sir, I would have put more of them on.

Further Direct Examination:

Ques. You didn't consider negroes were as qualified as white men?

Ans. Well, in some things they are, but as to jury service 99 per cent. of them are not.

Ques. Because they were negroes you didn't consider they were as qualified as white men?

Ans. No sir, I didn't say that.

Ques. I will ask you if it is not a fact that the jury commissioners believed, and you excluded the negroes because of that belief, that they were not as well qualified as jurors not as good jurors, would not make as good jurors, because he was a negro?

Ans. No sir, just as I have stated, in the first place as to the white men, each one of them we knew to be qualified before he was put on; we didn't discriminate the white man from the negro as a man; we only put negroes on we knew were qualified, and the same with the white men; every white man who went on there one or the other of the jury commissioners knew, and we didn't put a man on there we didn't know to be qualified; the same with reference to the negroes.

Ques. And the same with reference to the men who had served and who had not served on the grand jury?

Ans. Yes sir, we took the book of the former jury commissioners, and from the tax roll.

Ques. You didn't follow the record altogether, you went
37 outside for some of them.

Ans. Well, when we knew a man was qualified we put him on.

Ques. You knew some who wanted to be put on, you didn't want on?

Ans. We didn't put any body on just because he wanted — on; it was what we wanted, not what they wanted; there were some on the list we didn't want.

Ques. How many jurors did you draw for the week or for the term?

Ans. Well, I don't recollect how many there were, I know we filed a list of fifty.

Ques. 50 were drawn for each week?
Ans. Yes sir.
Ques. Only one negro for each week?
Ans. Yes sir.

J. L. PARKER, called as a witness by the defendant, first duly sworn, testified as follows:—

Ques. You live in this county, Mr. Parker?
Ans. Yes sir.
Ques. How long have you lived in this county?
Ans. Some 30 years.
Ques. Have you ever served as jury commissioner in this county in this court?
Ans. Yes sir, once.
Ques. When was that?
Ans. Last month; last term.
Ques. Last term, for this term of court?
Ans. Yes sir, it was for this term of court.
Ques. You are one of the jury commissioners who drew the special venire list?
Ans. Yes sir.
Ques. Mr. Parker, I wish you would state to the court how you made up the special venire list, from what information, from what source that was made?
38 Ans. How we got the names?
Ques. Yes sir, from what source?
Ans. Well, we got them from the poll tax list and tax roll.
Ques. How many names did you draw?
Ans. I think some 200 and over.
Ques. How many did you draw for the regular service for the week, on the regular panel?
Ans. Well, 200 I think for the term—50 for the week.
Ques. In drawing the regular jury for each week, did you draw any negroes on the jury?
Ans. Yes sir, some.
Ques. Do you know how many?
Ans. No sir, I don't.
Ques. Could you say how many, how they were apportioned for the week?
Ans. No, sir, I would not say how many.
Ques. You don't know?
Ans. No sir, I don't.
Ques. Did you consider that question as to whether any negroes were drawn or not?
Ans. The judge charged *is* not to discriminate against the negro.
Ques. That is how you happened to put some on, is it?
Ans. Not in particular; where we found a good man, we put him on; wherever we thought he was qualified.
Ques. In considering the names to make up the list of juries for the week how did you take them; in their order in which you found them on the poll tax list and on the tax list?

Ans. Yes sir.
Ques. In the regular order?
Ans. Yes sir, regular order.
Ques. Did the list indicate whether they were white or colored?
Ans. Yes sir.
Ques. Did you consider white and colored along together,
39 as a matter of fact?
Ans. Well, where they were known, we did.
Ques. Well, where they were not known, how then?
Ans. Where we did not know them, why we tried to get the jury we thought was qualified.
Ques. Do you know how many negroes were drawn for the special venire out of the 200?
Ans. No sir, I don't.
Ques. Have you any idea?
Ans. No sir.
Ques. Did you discuss any of them as you were drawing that list?
Ans. No sir.
Ques. After the regular list for the term was drawn, did you draw the special venire?
Ans. Yes sir.
Ques. I mean list?
Ans. Yes sir.
Ques. You don't know anything about the drawing of the special venire?
Ans. No sir.
Ques. Do you know whether any negroes were on the grand jury drawn by you?
Ans. I don't know for certain whether there is or not; I think so; I think there were some drawn on it.
Ques. You are not sure about it?
Ans. No sir, I am not sure about it; I don't know.
Ques. Did you have any occasion in drawing this list to ascertain the proportion of negroes or colored men in the list to draw off before you made it up?
Ans. No sir.
Ques. You didn't stop to consider at all what proportion were colored and what white?
Ans. No sir.

Cross-examination:

Ques. You stated that you were instructed by Judge Gillaspie the Judge of this court before you entered upon your duties?
40 Ans. Yes sir.
Ques. Among other instructions you were instructed not to discriminate against any race or color or any nationality?
Ans. Yes sir.
Ques. You didn't do that?
Ans. No sir.
Ques. I understood you to say to Judge Allen, the counsel who just examined you, that you considered white and negroes alike,

and that you tried to draw only such men as you knew would be qualified as jurors?

Ans. Yes sir.

Ques. And in considering blacks you considered them just the same as you did whites?

Ans. Yes sir.

Ques. Did you find the percentage of blacks you knew to be very small?

Ans. Yes sir, very small.

Ques. For qualified jurors?

Ans. Yes sir.

Ques. Didn't the judge of this court further instruct you—I mean the jury commissioners—that in selecting the jury if you found any good negro jurors, you were to put them on?

Ans. Yes sir, and we did so.

Ques. You followed those instructions in making up the jury?

Ans. Yes sir.

Ques. Did you leave off any negro at all whose name you may have run across, because he was a negro?

Ans. Not a one.

Ques. You gave them exactly the same consideration as you did the white men?

Ans. Yes sir.

EWING MCKINNEY, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Ewing McKinney?

Ans. Yes sir.

Ques. You reside in this city?

Ans. I do.

41 Ques. What is your position?

Ans. Bailiff on the grand jury.

Ques. Bailiff on the grand jury—how long have you acted Bailiff on the grand jury?

Ans. Nearly three years and a half; off and on.

Ques. Were you Bailiff of the grand jury each term during that time?

Ans. With the exception of one.

Ques. During that time state how many negroes have served on the grand jury at any one time?

Ans. Well, one negro.

Ques. State whether more than one negro has served on the grand jury during the time you have served as Bailiff?

Ans. No sir.

Ques. Do you know about the population of this county?

Ans. No sir, I don't know as I do.

Ques. Or about the voting population?

Ans. I don't know as I do; No sir.

Cross-examination:

Ques. McKinney, do you remember of the case where the defendant was indicted for assault to rape; Do you remember the time he was indicted?

Ans. Probably so, But I don't remember the term, I think that was in 1901.

Ques. Do you know whether or not that grand jury had two negroes on it?

Ans. Yes sir.

Ques. You don't know whether more were drawn or not?

Ans. No sir, I know that one served last term.

Ques. You don't know whether more than one was drawn or not?

Ans. No sir.

42 GEO. L. GLASS, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. What is your name?

Ans. Geo. L. Glass.

Ques. What position do you hold?

Ans. State and County Tax Collector.

Ques. Do you have charge of the poll tax roll?

Ans. Yes sir.

Ques. I will ask you to state Mr. Glass, if you can, approximately, the number of voters—qualified voters in Harris county?

Ans. I can't state the exact number; but it is less than 8000.

Ques. Well, qualified voters make up the tax list?

Ans. Yes sir.

Ques. Do you remember what proportion of the voters, qualified voters, according to the tax list, were colored and what were white?

Ans. I never take any separate list of the colored from the whites, I take the list of all.

Ques. Do you remember approximately, how many colored voters there are?

Ans. Yes sir, I think less than one-fourth.

Ques. Something near one-fourth?

Ans. Well, I think about one-fourth of the total.

Ques. In your judgment, one fourth of the qualified voters according to the poll tax list are colored?

Ans. Very nearly that.

Ques. Nearly one fourth of the qualified voters are colored?

Ans. Yes sir, by that I mean *w*hose who have paid their poll tax, and those who don't swear out any exemption papers.

Ques. Do you know about what proportion of the colored people, colored voters are qualified jurors, either householders or free holders?

43 Ans. No sir, there is no way for me to know in my official capacity, because as Tax Collector I don't make any distinction between white and black.

Ques. Do you know officially how many colored tax payers there are here?

Ans. No, sir, I don't believe I do, not in my official capacity.

Ques. I will ask you if the poll tax record, poll list, shows all of the voters of the county; that is, whether or not all voters were qualified according to the poll tax law?

Ans. I don't think it shows all——

Ques. About what percentage of the voters of the county fail to pay their poll tax, as near as you can estimate it?

Ans. Well, I don't know that I can answer that question. Well, about one-third, I expect, of the entire vote, have paid their poll tax.

Ques: How long have you been in Texas?

Ans. Well, about 17 years.

Ques. How many times have you been elected in this county?

Ans. This is my second term.

Ques. If your honor please, for the purpose of getting it in the record fully, I want to inquire with reference to the party vote—I will ask you to state whether or not you were nominated and elected by the dominant political party of the county each time?

Ans. Why, I was nominated by the democratic party, yes, sir.

Ques. I will ask you if you are acquainted with the custom of the dominant political party with reference to permitting negroes to participate in the primary election for the nomination of party candidates for the elective officers of this county for the last 11 years?

(Same objection by State's counsel as to former question.)

The COURT: I don't consider it a material inquiry here.

Ques. I will ask you to state whether or not it is a fact, if it is a fact that negroes were excluded from participating in the
44 primary elections of the dominant party of the county, because of their race and color?

(Same objection, by State's counsel.)

Ans. If a man was a qualified voter, he was not excluded because of color, because he was a republican.

Ques. I will ask you if it was not announced, and if it has not been the rule for the past several years in this county that a democratic primary would only permit white persons to participate and vote at such primaries?

Ans. As I said, I know of no such rule as to color, but if they were excluded, it was because they were republicans; republicans would not allow democrats to participate in their primaries, whether they were white or colored.

Ques. They were excluded because they were republicans?

Ans. Yes, sir, because they were republicans.

Ques. Don't the primary call exclude all but white voters?

Ans. No, sir, I don't believe that word "white" was used, it only excluded those who are not democrats.

Cross-examination:

Ques. Upon that point—Republicans do not admit democrats in their primaries?

Ans. No, sir.

Ques. It is customary, the political custom (inasmuch as we have got into this business) for democrats only to permit democrats to vote in their primaries, and likewise republicans, to permit republicans only to vote in their primaries?

Ans. Yes, sir, that is the rule with each political party.

Ques. In other words, political parties don't admit the enemies of their organization to vote for their candidates at the primaries?

Ans. No, sir.

45 Ques. Such negroes in the county who are known as democrats by their affiliation with the democratic party, were just as welcome as anybody else?

Ans. Yes, sir.

Ques. There were none excluded from the primaries simply because they were negroes, but because they were republicans, and white men who were republicans were just as much excluded as negroes?

Ans. Yes, sir.

Ques. Now, Mr. Glass, speaking of your poll tax list, you say you could not tell by a bare inspection of the list whether the parties are white or colored, unless you knew the persons?

Ans. I can on the poll tax list, because that requires the residence and color stated. But the ad valorum tax roll, upon which the poll tax is based, does not show it, no, sir.

L. L. PUGH, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is L. L. Pugh?

Ans. Yes, sir.

Ques. What official position, if any do you hold in this county?

Ans. County Superintendent of Schools.

Ques. How long have you been county superintendent of schools?

Ans. For about two years.

Ques. Do you know the population of this county with reference to the relative number of negroes and whites?

Ans. Well, I have some knowledge of it.

Ques. Well, do you know the approximate negro population of this county?

Ans. No, sir, I don't know it.

46 Ques. Do you know how many negro school teachers there are in the county? In the county, outside of the city?

Ans. Well, about 32 to 35.

Ques. How many in the city?

Ans. I don't know.

Ques. How many schools are there outside, negro schools?

Ans. About 32 I think.

Ques. What is the proportion with reference to white schools?

Ans. About 70 white schools and 32 colored schools?

—. ——.

Ans. Yes sir.

Ques. Give us the proportion with reference to pupils?

Ans. Well, about 1000 colored in the country, to 3,000 white in the country.

Ques. Can you give us an estimate of the number of colored voters in the country?

Ans. No sir, I could not.

Cross-examination:

Ques. In giving the number of negro school teachers, do you remember what percentage of those teachers are women?

Ans. I believe about four of them in the country are male.

Ques. There are only four male negro teachers in the county; 29 of them are women?

Ans. Yes sir.

Ques. You know that under the law of this State women don't serve on juries? Ans. Yes sir.

Ques. School teachers are also exempt from jury service?

Ans. Yes sir.

Ques. Do you know what percentage of those four men, how many of them are residents of the county?

Ans. No sir, I do not.

Ques. Now of the entire 1000 negro children, of course, they are all under age, they are all minors?

Ans. Yes sir, of school age.

Ques. Between 8 and 17 years?

Ans. Yes sir.

Ques. You say there are 32 negro schools in the country as against 70 of the whites?

Ans. Yes sir.

47 Ques. Do you know anything about the proportion of adults these children represent as to negro teachers outside of the city?

Ans. No sir.

Ques. Do you know what proportion the children and adults represent of the qualified voters?

Ans. No sir.

Ques. You don't know anything about the respective proportion of the white and colored people?

Ans. No sir.

Ques. You don't know how many thousand of white children, as to voters, they represent?

Ans. No sir.

J. B. PARKER, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is J. B. Parker?

Ans. Yes sir.

Ques. Mr. Parker, you have lived in this county for how long?

Ans. Well, 34 years.

Ques. What position, if any, have you held in this county?

Ans. Deputy sheriff.

Ques. For how long?

Ans. A little over 15 years.

Ques. I will ask you to state what court you have been in most of the time?

Ans. The most of the time, in the criminal court.

Ques. Have you been serving as deputy sheriff in the criminal district court of Harris county for the last 6 or 7 years?

Ans. Yes sir.

Ques. I will ask you to state Mr. Parker, if you know about how many negroes have served on juries at the respective terms of court in any week?

Ans. As many as two, and I think one week there was three.

Ques. Have you ever known more than three?

Ans. No sir.

48 Ques. How often has it occurred there were as many as three?

Ans. I don't remember, except the one time.

Ques. How often has it occurred there — as many as two?

Ans. Oh, several times; during several terms of court.

Ques. During the entire court, or just one week?

Ans. Well, we had as many as two colored men on for two weeks at a time, and probably for the term of court.

Ques. How many jurors were on the list at that time, at the time the two colored men were on; how many were there?

Ans. Well, in this court we impanel generally from 32 to 40 sometimes.

Ques. Have you ever known of more than three negroes on any regular jury during any term of this court for the past 6, 7 or 8 years?

Ans. No.

Ques. How many have been on the grand jury, do you know?

Ans. I don't remember of their being more than one at a time.

Ques. And not always one?

Ans. No.

Ques. I will ask you if you remember about the time the Whitney case was tried?

Ans. I don't exactly, I think about five years ago; in 1901 or somewhere along there.

Ques. You remember that case, do you?

Ans. Yes sir.

Ques. What was the practice in this court with reference to putting negroes on grand juries prior to that time? Were there any negroes on the grand juries or not, for a number of years prior to that time?

Ans. Well, I don't exactly know when they commenced putting negroes on the grand jury. I think the question came up some time before in the Carter case at Galveston, if I am not mistaken.

Ques. That question was raised in the Whitney case, was it not?

Ans. Yes sir, it was, and before that.

49 Ques. Were there any negroes on the grand jury prior to that time, if you remember?

Ans. I would not say positively there was.
Ques. Nor on the petit juries prior to that time?
Ans. Well, I could not say exactly what time, that far back.
Ques. Up to that time, the time the question was raised, had there been negroes selected, and to what extent?
Ans. On juries?
Ques. Yes sir?
Ans. Well, they have been drawn by jury commissioners.
—. The negroes you spoke of as having been on juries, serving on the regular jury has been since that time?
Ans. Yes sir, since that time.
Ques. The negroes who have served on grand juries has been since that time too?
Ans. Well, I could not say there were any before, I would not be positive though.
Ques. Have you ever known of more than one negro on a grand jury since that time?
Ans. I could not say that I have, no sir.
Ques. Are you acquainted with the negro population here generally?
Ans. Well, not only by hearsay.
Ques. What is the population of this county?
Ans. City and country? Well, I should judge from 70,000 to 80,000.
Ques. About what proportion are negroes?
Ans. Well, 10, 12 to 15 per cent.
Ques. The proportion may be more than that?
Ans. Yes sir, I would not say positively, it might be more or less.

Cross-examination:

Ques. As to the length of time you have been summoning and drawing these negroes; do you remember the Carter case?
Ans. Yes sir.
Ques. That has been some time ago?
Ans. Yes sir.
50 Ques. I will ask you if the practice ever since then, and before this Whitney case, they have not been drawing negroes on the grand jury and also for the different weeks of petit jury?
Ans. Well, if *it* knew when that Carter case from Galveston was decided I could tell.
Ques. Well, in the Whitney case, the report shows, that there were two negroes on the grand jury that found the bill?
Ans. Yes sir.
Ques. Now, you won't say there has not been on some grand juries as many as two negroes?
Ans. Not positively, I don't remember.
Ques. Now, if the record shows that two negroes were on the grand jury that found that second bill of indictment against Ralph Whitney; if the record shows that, it is bound to be so?

Ans. Yes sir, I suppose so.

Ques. It was while Judge Gillaspie was district attorney, and while Judge Allen was on the bench when the Carter case was tried?

Ans. I knew of the Whitney case, and of the Carter case; the Carter case is the one I referred to.

Ques. I will ask you if it is not a fact that since the Carter case about seven years ago in this court, negroes have been drawn upon juries?

Ans. Yes sir.

Ques. You are fairly well acquainted with the negro population of this county?

Ans. Yes sir, tolerably well.

Ques. Is it not a fact that a large proportion of the negroes of this county are not qualified jurors?

Ans. In the county?

Ques. Well, not as well qualified as white people?

Ans. Yes sir.

Ques. That is a fact?

Ans. Yes sir.

51 Ques. You say that according to your judgment the population of the county is 70,000 or 80,000?

Ans. Yes sir.

Ques. And about 12 to 15 per cent. of your estimate of that population are negroes?

Ans. Yes sir.

Ques. That includes men, women and children?

Ans. Yes sir.

Ques. All the population?

Ans. Yes sir, all the whole entire population; well, there may be probably more than that.

Ques. You say that whatever estimate you may fix on, it includes men, women and children?

Ans. Yes sir.

Ques. You include men, women and children in your estimate of the population of the county?

Ans. Yes sir.

Ques. In giving the percentage that the negro race occupy of that whole population, you also include men, women and children?

Ans. Yes sir, I do.

Ques. Do you know what number of the 12 or 15 per cent. of the entire population are men?

Ans. No sir, I could not say.

Ques. Do you know what number of them are qualified jurors? that is, people who can read and write, and are householders or freeholders, not under indictment or any other disability?

Ans. No sir, I could not say.

Ques. With defects of sight or hearing?

Ans. No sir, I could not say.

Ques. Do you know of, within the period inquired about by Mr.

Allen, of negroes being discriminated against by jury commissioners *and* drawing juries?

Ans. No sir.

Further direct examination:

Ques. Do you know why the number was limited to one on the grand jury and two on the petit jury?

Ans. No sir.

Ques. You were not with the jury commissioners?

Ans. No sir.

Ques. You don't understand it was discriminating against the negro; but you merely state that they did have one and probobly two sometimes on the grand jury and one generally——

Ans. Yes sir.

Ques. On the petit jury?

Ans. Yes sir.

C. N. LOVE (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is C. N. Love?

Ans. Yes sir.

Ques. Where do you reside?

Ans. In the 4th ward of this city.

Ques. What is your business.

Ans. Editing a paper; publishing a paper.

Ques. What paper is it?

Ans. ——.

Ques. Is that paper published in the interest of the colored people?

Ans. Yes sir.

Ques. Are you acquainted with the population of this county—the approximate population?

Ans. Yes sir, somewhat; I was very familiar with it two years ago.

Ques. Well, at that time what was the approximate population of this county?

Ans. Two years ago the population was 77,000, about.

Ques. What proportion of that population were negroes and what proportion white people?

Ans. In the city two years ago the negroes embraced about 25 per cent.

Ques. What was the approximate proportion of the county?

Ans. About 35 per cent.

Ques. What would be the approximate voting population of the county?

Ans. Inucluding those who hadn't paid their poll tax?

Ques. Yes sir. What proportion of the voting population of the voters of Harris county are negroes; about what number?

Ans. Well, about 25 per cent.

Ques. That would make how many negro voters in this county?

Ans. About 3500.

Ques. What proportion of the negroes are qualified jurors, householders or freeholders, able to read and write, not under indictment, etc.?

Ans. Well, about 20 per cent. of the voting population.

Ques. And about how many qualified jurors would you judge there were in this county?

Ans. Well, about 800.

Ques. How many negro school teachers are there, do you know?

Ans. Well, quite a number are out of service now; but, I suppose there are about 150.

Ques. Well, how many negro business men are there in Houston who can read and write, qualified for jury service, do you know, approximately?

Ans. Well, I know of some colored business men.

Ques. Do you know how many negro barbers there are?

Ans. Barbers and journeymen?

Ques. Both?

Ans. Well, I think 75 or 80.

Ques. Are they men generally who are either householders or freeholders either rent or own property?

Ans. Yes sir.

Ques. Are they men who can read and write?

Ans. Yes sir.

Ques. And qualified jurors?

Ans. Yes sir, as I understand it. Including those who don't pay their poll tax.

Ques. Just eliminate the poll tax question?

Ans. Well, I could not tell you.

Ques. That either rent or own property?

Ans. Yes sir.

Ques. Do you know how many negroes are engaged in the real estate business?

Ans. I suppose a dozen or more.

Ques. Well, how many negro doctors are there?

54 Ans. Well, about six (three)?

Ques. Well how many preachers?

Ans. Well of preachers we have an abundance.

Ques. Well, about how many?

Ans. Well, we may have more than I know of; but will say we have about 10 altogether.

Ques. In the county?

Ans. Yes sir.

Ques. How many newspaper men and publishers?

Ans. Well, publishers we have five.

Ques. How many editors?

Ans. Four.

Ques. How many negro printers?

Ans. About 10 or 12.

Cross-examination:

Ques. How many of the school teachers you have named are men?

Ans. Well, I think about a dozen.

Ques. Can you name how many printers there are, or about how many?

Ans. Well, there are quite a number about town here, I know of several at 112½ Preston St.

Ques. You mean by printers, men who set type?

Ans. Yes sir.

Ques. You say that the colored population consists of about 20 per cent. or 25 per cent. of the whole population of the county and city?

Ans. Yes sir, of the voting population.

Ques. 25 per cent.?

Ans. Yes sir.

Ques. You say that 25 per cent. of that 20 per cent. are qualified jurors?

Ans. Yes sir.

Ques. What do you regard as a qualified voter?

Ans. One who can read and write; understand and interpret the law when he reads it; one who is able to discriminate between right and wrong. I mean such men as Van McKinney, J. I. Richards and that class of men over there.

55 Ques. Do you understand or know whether or not any of the men you name have ever been under indictment?

Ans. No sir, they have never been indicted, not that I know of.

Ques. Has Joe Dixon ever been indicted?

Ans. Jo Dixon is a qualified voter.

Ques. I don't mean this as a personal reference. You are a colored man, are you?

Ans. Yes sir.

Ques. I will ask you what proportion of the negro voters of the county either own their homes or rent property?

Ans. In the county?

Ques. Yes, in the county, do you know?

Ans. Well, I think quite a number.

Ques. Well, you ought to know, you estimate the population of the county, and spoke of 3500?

Ans. That applies to the entire county.

Ques. What proportion of the voters throughout the county either own real estate or lease, rent, in the county?

Ans. Well, about 9½ or 10 per cent. own directly.

Ques. How many rent?

Ans. Well, about ¾ of the population rent.

Ques. Voters in the county; you have given the negro voters as ¾ who either rent or own property of their own, they are either householders *are* free holders?

Ans. Yes sir.

Ques. What proportion of them can read and write?

Ans. What proportion of the general population?

Ques. Of the negro voters; the 3500 negro voters?

Ans. Oh, I suppose not less than 12½ per cent. can read and write.

Ques. Do you mean that 12½ per cent. of the negro voters can read and write or do you mean they can't read and write?

Ans. Of the 3500?

Ques. Yes, how many of them can read and write?

56 Ans. Well, about 1000 out of the 3500.

Ques. You think 2,000 of them either rent or own property; or do you mean they neither rent nor own property?

Ans. No sir; I make that estimate upon the basis of population; I mean of the voters; now, there are 75 or 80 barbers, negro barbers working in shops, who can read and write, but all of them don't own or rent property.

Ques. Well, what proportion of the men you have named can read and write, rent property or own real estate?

Ans. Well, I think about 25 per cent.

Ques. Now, as I understand you, if I understand you correctly 25 per cent. of the colored population can read and write?

Ans. Yes sir, 25 per cent. at least 25 per cent. of the vote—of the voting population can read and write.

F. I. RICHARDS, called as a witness by the defendant, first duly sworn, (colored) testified as follows:

Ques. What is your name?
Ans. F. I. Richardson.
Ques. Where do you live?
Ans. My residence now is 1212 Williams St.
Ques. In the city of Houston?
Ans. Yes sir.
Ques. How long have you lived in Harris County?
Ans. 12 or 15 years.
Ques. What is your business or calling?
Ans. I am engaged in Notary Public work now.
Ques. Have you been a school teacher?
Ans. Yes sir, but not lately.
Ques. How long have you lived in that county?
Ans. Never outside.
—. You have taught in the city schools, have you?
Ans. Yes sir.
Ques. Are you acquainted with negro population of the county?
Ans. Somewhat.

Ques. How many school teachers in this county, negro
57 school teachers, including the country?

Ans. I think about 110.

Ques. How many of them are males, and how many females?
Ans. Well, perhaps about 25 or 30 are males.
Ques. Well, how many negro preachers are there in the county? Can you give an estimate of about how many there are?
Ans. No sir.
Ques. How many negro schools in the country and city altogether?

Ans. I don't know very much about the country.
Ques. Is there a High School for colored people in the city?
Ans. Yes sir.
Ques. How many negro real estate men are there in this county?
Ans. About 10 or 12.
Ques. How many barbers?
Ans. 75 or 80 may be.
Ques. How many physicians?
Ans. Well, 10 or 12, I think.
Ques. About how many negro voters are there in the county?
Ans. Qualified voters in the county?
Ques. Including those exempt from poll tax?
Ans. I think 3500.
Ques. What per cent.—how many of the 3500 negro voters in the county can read and write?
Ans. At least 25 per cent.
Ques. What per cent. of them either rent their homes or own real estate?
Ans. 10 per cent. of them own their homes.
Ques. How many of them are householders?
Ans. Well, about — per cent.
Ques. I mean men with families, not freeholders.
The COURT: That occupy or control a house, means a householder.

Ans. About 75 or 80 per cent.

58 Ques. Are you familiar with the practice of the dominant political party for the past 8 or 10 years with reference to permitting or excluding negroes from participating in their party primaries for the nomination of candidates for county offices?
Ans. I think I am.
Ques. What has been the practice with reference to permitting or excluding negroes from participating in their party primaries for the past 8 or 10 years?
Ans. There was a time when negroes could perhaps participate in their primaries, but here recently, for a few years back they are excluded. Under their rule or law, no one but a citizen of the white race are allowed to participate, that is the law of democratic primaries.
Ques. They are excluded because of their color?
Ans. Yes sir, because it says "white," and it must mean to exclude men of color.
Ques. How long has that practice prevailed?
Ans. For 3 or 4 years.

Cross-examination:

Ques. Where is that law you speak of, of democratic primaries; have you got it with you?
Ans. No sir, I have not got it with me. But I have it among some of my papers, I think.
Ques. Did you ever hear of a democratic darkey being excluded from voting in a democratic primary?
Ans. No sir, not if he is a democrat*ic*; but I have heard——

Ques. Never mind what you have heard, answer that question?

Ans. No sir, I never heard of a democratic negro being excluded from voting in a democratic primary; but I don't know of many such.

Ques. Well, White republicans are also excluded, are they not?

59

Ans. Yes sir, but I know from reading the law—it says white voters.

Ques. Now — you know anything about politics at all?

Ans. Yes sir.

Ques. Don't you know that whether a man is white or b-ack, if he is a democrat he can vote in a democratic primary; But that if he is a republican, white or black, he can't vote in a democratic primary?

Ans. I know this——

Ques. Now, just answer that question first?

Ans. He can in the general election, but he can't in the primaries.

Ques. He can't go there and vote in this county? That is your idea of primaries, is it?

Ans. Yes sir.

Ques. How many darkies can you name who own their homes. I am talking about what you know; how many can you name?

Ans. Perhaps 60.

Ques. Can't you name more than 60.

Ans. Perhaps I can.

Ques. Well, can you, you say "perhaps"; give the number, give the names of those who own their homes?

Ans. Well, I can't name them without the deeds.

Ques. Well, have you examined the deeds?

Ans. No.

Ques. You don't know *where* a single one of them has got a good title or not?

Ans. No sir.

Ques. Well, how many can you name of this 75 or 80 per cent. of voting population you say keep house; how many can you name of the 75 or 80 per cent. that you can swear keep house, or rent houses in this county?

Ans. I think I can name 60 per cent. during my time.

Ques. You know that many, about 60 per cent. of that 75 or 80 per cent.; that leaves a balance of 15 or 20 per cent. you don't know?

60

Ans. Yes sir.

Ques. You are just *q*uessing at that?

Ans. Yes sir.

Ques. Of the negro school teachers, you say about 35 are men; you know they are exempt under the law?

Ans. Yes sir.

Ques. From jury service?

Ans. I know they can't serve.

Ques. You know preachers are exempt, don't you?

Ans. Yes sir.

Ques. How do you arrive at the number of negroes who can read and write in the county?

Ans. Well, through my connection with the men in church affairs, lodge affairs and political affairs.

Ques. Well, of the number that can read and write—you estimate about what per cent. of the 3500 can read and write?

Ans. About 1500.

Ques. Well of the 1500 do you know how many of them are otherwise qualified for jury service?

Ans. No sir.

Ques. You don't know?

Ans. No sir.

VAN H. MCKINNEY (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. What is your business?

Ans. I am a printer—in the printing business.

Ques. How long have you been a resident of Harris County?

Ans. About 13 years.

Ques. How long have you been engaged in the printing business?

Ans. 13 years.

Ques. Are you acquainted with the negro population of Harris County?

Ans. Yes sir.

Ques. Generally?

Ans. Yes sir.

Ques. About what is the colored population of this county?

Ans. Well, of the county, I would estimate it at about 20,000.

Ques. What is the white population?

Ans. About 70,000.

61 Ques. Do you know about how many negro voters there are in the county, qualified voters?

Ans. Well, the last time I made an estimate of it, it was 400 voters in the county, outside of the city. At that time the colored voters were in the city (that was about two years ago) at that time the colored votes in the city was about 1,800, making a total of 2,200.

Ques. What proportion of the colored voters of the county can read and write—approximately, about?

Ans. About 25 per cent.

Ques. What proportion of them either own their homes or rent in this county?

Ans. About 75 per cent.

Ques. What proportion of them, of the negro voters of the county would be qualified for jury service, as you understand it?

Ans. As I understand it, of the voting population, I would say about 60 per cent. of those are qualified as jurors.

Ques. Either own or rent property, can read and write, and never have been under indictment?

Ans. Yes sir.

Ques. How many school teachers are there in this county?

Ans. That is a question I could not answer intelligently.

Ques. You can't answer that?

Ans. No sir.

Ques. Do you know how many printers there are in the county?

Ans. Well, white or colored?

Ques. Well, *no* colored, counting all over the county?

Ans. Some 10 or 12, the most of them are journeymen, they come and go of those that remain here, there are some 8 to 12 colored printers.

Ques. How many colored papers are there here?

Ans. Well, of colored papers, there are four.

Ques. Four published in this county?

Ans. Well, you might say published and edited, there are four.

62 Ques. Do you know the number of barbers, colored men engaged in that line in the city?

Ans. Well, I got up a directory some time ago, showing the number of colored men engaged in business, in fact, I got up a directory this year, and that directory would show about 35 men engaged in the grocery business, about 10 in the real estate business; about 25 in the restaurant business; about 12 doctors; four lawyers, barbers of course, I can't tell how many the directory would show, but there must be as many as——

Ques. As many as 80?

Ans. There are about 90.

Ques. Any engaged in the dairy business?

Ans. No sir, not to my knowledge.

Ques. In the laundry business?

Ans. Laundry business? one firm.

Cross-examination:

—. In what way can you tell how many, what percentage of colored people have never been indicted of crime, you have not known them in this county very long, only about 12 or 13 years?

Ans. I say I can't know them all in 12 or 15 years' residence here; but I am living in South Texas now; I don't know them all, but I do know a number of people in the 13 years who have not committed any crime; they may have been charged with crime, but came out clear.

Ques. You don't know, as a matter of fact, whether any have ever been convicted or not?

Ans. Any single individual?

Ques. Yes sir?

Ans. No sir.

Ques. Now the journeymen printers you spoke of as coming and going, are they voters?

Ans. Well, as a rule, journeymen printers are not voters.

Ques. They don't stay long enough to acquire a habitation?

Ans. Well several come in to stay——

63 Ques. But the most of them are on the go?

Ans. Some of them have families, but the majority of them are journeymen travelers.

Ques. Now, you say that about two years ago there was 400 voters, negro voters in the county, outside of the city?

Ans. Yes sir, outside of the city.

Ques. And about 1,800 in the city, making a total of 2,200. Now in what way did you arrive at the per cent. who can read and write?

Ans. In this way; for instance, I belong to a lodge, in that lodge are 30 members; of the 30 members we know what they are capable of doing—they can read and write; in the church there may be 500 members who would possess certain literary qualifications, of good education and standing, and in the lodge, outside of two——

Ques. That is with reference to the church you belong to?

Ans. Well, the church I belong to is made up of about the same, generally speaking.

Ques. As other churches, you mean?

Ans. They exist under the same conditions.

Ques. You don't mean to say you followed that up in all the churches in the city and country?

Ans. No sir.

Ques. Now, how many churches have you canvassed in that way?

Ans. Well, I canvassed one church, and stopped; but I belong to five different lodges.

Ques. Five different lodges and one church?

Ans. Yes sir. The five different lodges are made up from all the churches you might say; all represented in the different lodges.

Ques. That is in the city churches?

Ans. Yes sir.

Ques. You didn't go in the country at all?

Ans. No sir.

Ques. How many are there of the lodges; how many do you belong to?

64 Ans. I belong to five.

Ques. How many in each lodge?

Ans. Well, the numbers vary from time to time, sometimes as low as 35 and again as high as 100 or 110.

Ques. Sometimes there are members of that lodge members of others also?

Ans. Yes, sir.

Ques. Now that is the way you get at the voting population of the city and country; you are merely guessing at it?

Ans. Well, I am practically guessing at it?

Ques. I say you are just guessing at it?

Ans. Well, that is not strictly guess work, it is approximately the number.

Ques. If you don't know in that way can you go out in a work shop and point out each man who can read and write?

Ans. No, sir.

Ques. You are just taking a certain number, and estimating from that?

Ans. Yes, sir.

Ques. And you average from a certain number?

Ans. Yes, sir.

Ques. Well, well how do you arrive at the number 25 per cent. of those who are voters, qualified voters own their homes; are either freeholders or renters?

Ans. How did I get at that?

Ques. Yes, at what per cent. own their homes?

Ans. According to my idea, about 10 per cent.

Ques. How do you arrive at that; from examination or from guess work?

Ans. I have made a special study of it; that is, I have done this: I *I* run a paper here for a number of years, and in running it I made it a point to know the number of our people who owned their homes in this community, and as to business men; then I also dis-
65 cussed the renting question, and in order to do that I had to know very approximately how many people were renters; of course that is an estimate, but it is about correct, as a rule.

Ques. It was simply an estimate, however?

Ans. Yes, sir.

Ques. What do you understand a qualified voter to be?

Ans. A qualified voter is one of 21 years of age; a male person; not a criminal, one under the new law who has paid his poll tax; a free holder or householder——

Ques. One who can read and write?

Ans. Yes, sir, read and write.

Ques. Now, how many of those voters—60 per cent. of this voting population, have defect in sight or hearing—I mean to be qualified for jurymen?

Ans. Well, I don't know.

Ques. Well, what do you take to be the meaning of freeholder or householder, in order to vote?

Ans. I take it to mean that a man must have all the qualifications to vote.

Ques. I want to know what understanding you have if any as to being an owner of land or renter to be qualified?

Ans. I don't understand it that way.

Further Direct Examination:

Ques. Are you familiar with the practice or custom of the dominant political party of this county at their primaries for the last several years with reference to excluding negroes from participating in the nomination of their party candidates?

The COURT: I think that is taking up the time of this court unnecessarily; it is immaterial to this inquiry.

To the ruling of the court, counsel for defendant excepted.

66 J. S. TIBBITT, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. What is your name?

Ans. John S. Tibbitt.

Ques. What is your business?

Ans. Insurance.

Ques. What kind of insurance?

Ans. Life insurance.

Ques. Where are you engaged in that business?

Ans. At # 413½ Travis St., Houston.

Ques. How long have you been engaged in that business in Houston?

Ans. About seven years.

Ques. Is that business conducted among colored people principally, or white and colored?

Ans. Entirely colored people.

Ques. What company do you represent?

Ans. The Southern Mutual Benefit Association.

Ques. In what capacity do you represent it?

Ans. As agent.

Ques. In your business do you come in contact with colored people of the city and country generally?

Ans. Yes, sir.

Ques. What is your judgment as to the negro population of this county?

Ans. I estimate it at about 20,000.

Ques. What is your judgment as to negro voters the number of negro voters, what per cent. in Harris County are negroes?

Ans. Well, from 2000 or 2500 to 4,000.

Ques. There are from 2000 to 4000 negro voters in this county?

Ans. Yes, sir.

Ques. What per cent. of the negro voters of Harris county are able to read and write?

Ans. Well, about 50 or 60 per cent.

Ques. What percentage of the negro voters of the county own homes or are renters, or freeholders, own real estate in Harris county?

Ans. About 25 per cent.

67 Ques. What percentage of the negro voters of Harris county are qualified jurors, or persons who are either freeholders or householders; able to read and write; never been convicted of any offense?

Ans. About a thousand I think.

Cross-examination:

Ques: You think that as many as 50 per cent. of them own their homes, do you?

Ans. Yes, sir.

S. J. Dixon (Colored) called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Where do you live?

Ans. I live at # 2913 Providence St.

Ques. How long have you lived in Houston?

Ans. About 17 years.

Ques. What is your business?

Ans. My trade is a barber; my business is financial agent for——

Ques. Are you acquainted with the negro population of Harris County?

Ans. Yes, sir, somewhat.

Ques. About what is the population of the county—negro population?

Ans. About 4,000 I suppose.

Ques. I mean of the entire population of the county?

Ans. Well, I don't know.

Ques. What is your judgment of the voting population; how many negro voters in Harris county?

Ans. About 4,000.

Ques. What per cent. of the negro voters of Harris county, can read and write?

68 Ans. I judge about half of them.

Ques. What per cent. of them are either freeholders or householders who own real estate in the State of Texas or rent in Harris county?

Ans. Well, about 60 per cent.

Ques. How many negro business men are there in Houston in all lines of business?

Ans. In all departments?

Ques. Yes in everything?

Ans. Well, I suppose 300 or 400.

Ques. Any of the proprietors of those establishments are men who can read and write.

Ans. Yes sir, the majority of them can.

Cross-examination:

Ques. You come across lots of them who can't read and write, haven't you?

Ans. Yes sir, I have; lots of them.

Ques. How many darkies can you name outside of Houston who own their own homes?

Ans. I don't know as I can undertake to name them all.

Ques. Can you name any?

Ans. Yes sir.

Ques. How many can you name?

Ans. I can name 4 or 5.

Ques. How many can you name in the city of Houston who own their own homes?

Ans. Oh, I suppose I can name a number, by giving me a little time.

Ques. Well, right now, name them?

Ans. Well, I don't know how many I can name right now. Give me time enough, long enough I can name as many as 50.

Ques. I don't know any better time to give the names than right now.

Ans. I don't know as I could do it right now, but I know there is more than that.

69 Ques. How do you know it; have you ever gone and examined their titles?

A. No.

Ques. Have you had any occasion to examine and investigate so as to know?

Ans. No sir.

Ques. Now, with reference *with* the number who can read and write; have you ever had occasion to know how many darkies in the county and city generally can read and write?

Ans. Well, sir, I belong to the Baptist denomination with its associations, where I know all the names and am supposed to know——

Ques. You know all that belong to that association?

Ans. Yes sir, about all of them.

Ques. You put the Baptist in first; they are stronger than the others?

Ans. No sir, the Baptist is as strong as any other; but the negro population are in all kinds in the country.

Ques. You speak of the Baptist; which has the largest number of members?

Ans. Well, not particularly the Baptist more than the Presbyterian; but the Baptist papers have a larger number of readers among the colored population in the country than any other.

Ques. Did you go to any particular association to find out how many can read and write?

Ans. Well, I find that we have the majority in that association in all parts of the state.

Ques. By the majority of them do you mean people who are qualified voters in other respects; who own their homes or rent houses, and are heads of families and so on?

Ans. Yes sir, I think I know because I belong to the Masonic lodge here where we have 75 members, I belong to ——
70 where we have 84 members; I belong to —— where we have 52 members; I belong to —— where we have 64 members; I belong to —— where we have 23 members; I belong to —— where we have 48 members; I belong to —— where we have 62 members.

Ques. That includes women and all; I am speaking of men now. I am speaking of qualified voters. Do you understand what I mean?

Ans. No sir, I don't catch your meaning exactly.

Ques. Well, Mr. Dixon, do you know that in order to be a qualified voter a man has got to be able to read and write; has got to have no such thing as defective hearing or sight that would interfere with his serving on a jury; and not to be under indictment for crime; do you know what percentage of this kind you are taking in?

Ans. That I am talking about in these lodges?

Ques. Yes sir.

Ans. No sir, I don't.

Ques. You have been indicted, haven't you?

Ans. Yes sir, I have been indicted for fighting.

Ques. How many times have you been indicted in this county?

Ans. I have been indicted twice for fighting, one for whipping—about my child; and one time there was a piece of city script found in my possession, but for that matter the attorney dismissed the

case, as I had bought it from a man who claimed he had worked for it; and I didn't know him from anybody else.

Ques. Once you were indicted for fighting; once you was under indictment for attempting to pass a forged instrument—or for forgery?

Ans. No sir, I wasn't indicted for forgery, I was indicted for having the script in my possession.

Ques. For having something in your possession that didn't belong to you?

Ans. Yes sir, $35.00 in city script.

71 Ques. Do you know the race and color of C. J. Richardson?

Ans. I think I know his race; he is a negro.

Ques. He is a colored man?

Ans. Yes sir, a negro.

Ques. You often mingle together, and belong to same race?

Ans. Yes sir.

Ques. —— belongs to the same race as you?

Ans. Yes sir.

Ques. Which is the colored race?

An. Yes sir.

Ques. You think the best of the colored race?

Ans. Yes sir.

NATHAN HALLER (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Nathan Haller?

Ans. Yes sir.

Ques. Nathan, where do you live?

Ans. I live in Houston, corner of ——.

Ques. How long have you lived in Houston?

Ans. About 5 years.

Ques. What is your business?

Ans. The most of the time I have been working for Lock McDaniel in the Federal Court for the last two years.

Ques. Are you acquainted with the negro population in this county?

Ans. Well, right smart here in town.

Ques. Well, do you know about the number of negro voters in the county, approximately?

Ans. Yes sir, I know about the general claim set up amongst our party men.

Ques. What is that estimate of the party?

Ans. Well, about 4,000.

Ques. Well, do you know about what per cent. of the negro voters can read and write?

Ans. Well, I don't know as I ever paid any attention to that.

72 Ques. Well, do you know what proportion rent their homes or own their property?

Ans. Well, the majority of them, I think near about ⅔ of them.

Ques. Well, do you know?

Ans. Well, I answered according to my best judgment, nearly two-thirds of them, according to my knowledge.

Cross-examination:

Ques. You have made no personal canvass as to who own their homes?

Ans. No, not personally.

Ques. Well, how many do you know own their homes?

Ans. Quite a number——

Ques. I asked you how many own their homes?

Ans. Well, you know——

Ques. Have you made any personal investigation so that you can state how many own their homes?

Ans. Oh, no.

Ques. Well, with reference to renters, outside of your own circle of acquaintances, have you made any personal investigation as to the number who rent houses?

Ans. No sir, but I know approximately, I know it is about two-thirds, I am satisfied.

Ques. You are just guessing at it?

Ans. Yes sir, from my business and from my mixing with them.

Ques. You don't know how many of them are qualified jurors, do you?

Ans. No sir, I don't know that.

C. E. SMITH, called as a witness by the State, first duly sworn, testified as follows:

Ques. Mr. Smith, you have heard the examination with reference to the special venire in this case?

73 Ques. I understood you to say Mr. Andrews, a colored man, was on the venire?

Ans. I said there was a T. A. Andrews on the venire.

Ques. You don't know whether he is white or colored?

Ans. He is a white man.

Ques. The special venire list drawn in this case of 133, as far as you know are all white men?

Ans. Yes sir.

Ques. Did you hear the list of names called this morning?

Ans. No sir, I didn't.

Cross-examination:

Ques. That is drawn from the entire list of 600?

Ans. Yes sir.

Ques. Is it not a fact that there are negroes among that list?

Ans. Yes sir, I could designate them.

Ques. Would you recognize their names that you know to be negroes in that list?

Ans. Yes sir.

Ques. Now, Captain, in drawing that special venire you did so as Deputy Clerk of this court?

Ans. Yes sir.

Ques. Did you in any way discriminate against negroes in drawing the names from this list of 600?

Ans. No sir.

Ques. What method did you pursue in shaking them up?

Ans. I shook up the whole box.

Ques. The whole 600, and just opened the box, and drew down to the number necessary for that special venire?

Ans. Yes sir.

Ques. Captain, there are 16 men drawn for the grand jury, out of which 12 are impaneled?

Ans. Yes sir.

By DEFENDANT'S COUNSEL:

Ques. How long have you lived in Houston and been Deputy Clerk of this Court?

Ans. About 5 years.

Ques. Have you ever known a colored man to sit on the jury?

Ans. Yes sir.

74 Ques. Has there ever been in this court to your knowledge any colored man appointed as a jury commissioner?

Ans. No sir.

By STATE'S COUNSEL:

Ques. Have you ever known them to be excluded who have been qualified to serve?

Ans. No sir.

Ques. You don't know of any being rejected because he wasn't white?

Ans. No sir.

O. A. RENYAUD, called, sworn, testified as follows:

Ques. What position do you hold?

Ans. Clerk of the Criminal District Court of Harris County.

Ques. How long have you resided in Houston?

Ans. Well, I have lived here all my life—about 44 years.

Ques. Did you have occasion some 12 months ago to examine and make an estimate of the number of qualified voters in this county — are negroes?

Ans. Yes sir, I figured it out here one day, and gave the memorandum to some one, I don't remember the number exactly, but I think something like 8 or 10 per cent., I am not positive as to that, as it has slipped my memory.

Ques. Well, it was about the court here you made the estimate?

Ans. Yes sir.

Cross-examination:

Ques. In what year did you make that memorandum?

Ans. In 1904.

Ques. You recognize the fact that a large percentage of the voters have not paid their poll tax and are not qualified to vote for that reason?

Ans. Yes sir.

Ques. It seems that payment of poll tax is not a necessary requirement for jury service?

The COURT: That is immaterial.

Ques. Your estimate was that only 8 or 10 per cent. of the qualified persons who are otherwise qualified to vote in this county,
75 have a poll tax receipt?

Ans. Yes sir.

Ques. What percentage of the general population, outside of the poll tax requirement, would you say are negroes?

Ans. I have no idea.

Ques. You know what it takes to be a qualified juror, such as being a householder or freeholder etc. Now, have you ever seen any man rejected by the court because of his color?

Ans. No sir.

Judge J. K. P. GILLASPIE, testified as follows:

Ques. I would like to have statement from the court with reference to the custom in selecting and instructing jury commissioners?

Ans. I have always instructed them to select qualified men; those they know and have knowledge from the records, have the requisite qualifications for service as jurors without any discrimination whatever as to race or color. That has been my invariable rule; and in this particular instance I remember telling the jury commissioners to not discriminate against any man otherwise qualified on account of race, color, or previous condition of servitude; that in the event they should do so their selection would be null and void. I have even gone further than that and instructed them that wherever they found good people who were qualified under the laws of this state. to select them irrespective of race or color, that in case they were of the colored race, it would tend to make them better citizens and show them that they had some interest in the execution of the laws of their country. I want to say this, that since I have been judge of this court I have been surprised to find men who have been summoned to serve as jurors who could neither read or write.
76 This is especially true, I know, as to colored men as to being qualified to serve on the regular jury.

Ques. It was because of this disqualification; but have you in any case failed to appoint a colored man as a jury commissioner simply because he was colored?

Ans. No sir, I believe in giving them representation as near as I possibly can.

Ques. In selecting them you used your knowledge of men as men who had that requisite qualification?

Ans. Yes sir, the requisite qualifications, and from the very best element of society.

Ques. That is the manner in which the jurors have been selected

Ans. Yes sir.

The COURT: The motion will be overruled.

To which ruling of the court, defendant's counsel excepted.

The foregoing is the official report.

S. W. BLODGETT,
Official Stenog.

And the court having duly considered said testimony and the said motion to quash the indictment and the said motion to quash the special venire then and there overruled said motions, and each of them to which ruling of the court in overruling the said motion to quash the indictment and the motion to quash the special venire herein, and each of them, the defendant then and there duly excepted and he here now tenders this his bill of exceptions to the said ruling of the court on each of said motions and ask- that the same be signed, certified and filed, as a part of the record in this cause.

It is hereby agreed between the counsel for the State and the counsel for the defendant that the above and foregoing transcript and bill of exceptions contains a full and correct
77 transcript of all of the testimony introduced upon the hearing of the motion to quash the indictment herein, and the defendant's motion to quash and set aside the special venire herein and that said testimony was by agreement of counsel with the consent of the court heard and *be* considered by the court upon each of said motions the same as if said motions had been heard separately, and that the foregoing transcript of the testimony and bill of exceptions may be approved by the court and filed herein, as a part of the record in this case, as to the transcript of the evidence, statement of facts and bill of exceptions upon the hearing and overruling of each of said motions the same as if said motions had been heard separately and a separate transcript, statement of facts, and bill of exceptions had been reserved, save- and filed upon each of said motions separately.

Dated this 18th day of January 1906.

NOAH ALLEN,
Attorney for Defendant.
E. T. BRANCH,
Attorney for the State.

Examined approved and signed by me and ordered to be filed as a part of the record in this cause a full and correct transcript of the evidence, statement of facts and bill of exceptions upon the defendant's motions to quash the indictment and the special venire herein, and each of them as per above agreement of counsel, this 18th day of January, 1906.

J. K. P. GILLASPIE,
Judge Criminal District Court, Harris County, Texas.

Filed January 19th, 1906.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

78 *Bill of Exceptions to Action of the Court in Refusing Continuance.*

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

The — Day of December, 1905.

Be it remembered that on the trial of the above entitled and numbered cause, when the same was called for trial, the defendant presented and read to this court his first application for the continuance of said cause as follows, to-wit:

In the Criminal District Court of Harris County, Texas.

14133.

STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Now comes the defendant Marcellus Thomas, in the above numbered and entitled cause, and under oath makes this his first application *of* a continuance of said cause on account of the absence of Annie Thomas, a material witness in his behalf, and who is not in attendance upon this court, and Elijah Robbins, a material witness in his behalf, who is not in attendance upon this court, and Elmore George, a material witness in his behalf, and who is not in attendance upon this court; and as grounds for the continuance represents to the court:

First. That the said Annie Thomas, temporarily resides in Silsby, Hardin County, Texas, that the diligence that has been used by this defendant to procure the attendance of said witness Annie Thomas, at the trial of this cause, is as follows, to-wit: On the 12th
79 day of December, 1905, defendant caused to be issued by the clerk of this court a subpœna for the said witness, and on the 13th, day of December 1905, caused the same to be placed in the post office duly and properly sealed, and enclosed in an envelope addressed to the sheriff of Hardin County, Texas, at Kountze, the county seat of said county, postage prepaid, which said subpœna was received by the said sheriff and has been returned unto this court with his return endorsed thereon: "Not served upon the said Annie Thomas for the reason that she could not be found," and that she was then supposed to be in Beaumont, Jefferson County, Texas, and is now on file with the records of this case, and the

same is herewith presented to the court for its inspection, as a part of this application; that the facts which the defendant expects to prove by the witness Annie Thomas, are as follows, viz: That on the evening of the alleged homicide charged in the indictment in this cause, she was at the home or residence of Clemeal Thomas, who only resides a short distance from the defendant Marcellus Thomas, and on the public road leading from Spring northward pass*ed* the house of the said Clemeal Thomas and Marcellus Thomas, upon which the killing or homicide alleged in this case was alleged to have taken place, and that while there, and sometime before the shooting was alleged to have taken place, she saw the deceased John Blair and one Ben Shropshire, both of whom are alleged to have been killed by this defendant at the same time and place, pass the house of the said Clemeal Thomas, in a state of intoxication, using loud and boisterous language, cursing and swearing, and that after the said Blair and Shropshire had passed the house of Clemeal Thomas had had ample time to pass the house of the defendant Marcellus Thomas, and get some distance beyond his house on said highway, the defendant Marcellus Thomas came from the town of Spring to the house of Clemeal Thomas, where the said wit-
80 ness was at the time she saw the said Blair and Shropshire pass*ed* said house; that at the time when the defendant Marcellus Thomas came to the house and went from Clemeal Thomas' house to his own house, he did not then have with him a gun or weapon of any kind, and that he could have not gone from the house of Clemeal Thomas, where she first saw him after Blair and Shropshire passed the house of Clemeal Thomas to his own house, and gotten out in the road or public highway, before the said Blair and Shropshire passed the home or house of the defendant Marcellus Thomas. Affiant further says that the testimony is material in this—that he is informed and alleges the fact to be, that the state prosecution claims and will endeavor to prove that the defendant had passed the said Shropshire and Blair on said public road before they reached the house of Clemeal Thomas, and had had some words or dispute with them, and after passing them had gone on to his own home, and secured his gun and gone out on the road or highway, just north and near his own house, and was lying in wait for the said Blair and Shropshire as they passed his house, and shot them — ambush, immediately after they had passed his house, as they came along the road, without notice or warning; whereas, defendant had not seen the said Blair and Shropshire before they passed his house, and had had no words or difficulty with them, and did not go to his house and procure his gun for the purpose of renewing a difficulty with them, that he had had no trouble with them whatever, and left his home to go to a neighbor and had taken his gun with him, and came in contact with the said Blair and Shropshire, after leaving his own house with his gun in possession, not knowing that they were upon the road anywhere near his house or in that vicinity, and while he was on his way from his house, to that of the neighbor, some distance away on a matter of business and that when he met or overtook the said Blair

81 and Shropshire in the road, they began a controversy with him, threatening to do him bodily injury and personal violence, and ran him for some distance down the roadway, when he left the road and went into the woods to avoid contact with them, and waited for some time for them to pass on, and on his return to the road, after having waited long enough for them to have gotten up the road, as he supposed they would do, he unexpectedly came upon the road, and they were sitting on the road side waiting for him, as soon as approached, they made for him—one of them with a pistol and the other with a knife, one of them grabbing his horse by the bridle, when in order to defend himself of their assault, and to protect his own life, or his body from personal violence and serious injuries he used his gun in self defence.

Affiant further says that the diligence which has been used by him to procure the attendance of the said witness Elijah Robbins at the trial of this case, is as follows, to-wit: On the 12th day of December 1905, he caused to be issued by the clerk of this court a subpœna for this witness and caused the same to be placed in the hands of the sheriff of Harris county, Texas, in which county the said witness has resided, and did reside, so far as this defendant was informed at the time of the issuance of the said subpœna, which said subpœna has been returned into this court by the said sheriff, and is now on file with the record of this case, and the same is herewith presented for inspection as a part of this application, and which subpœna, or the return of the sheriff thereon, shows that the subpœna was not served, because the said Elijah Robbins could not be found in said county of Harris, that the facts which the said defendant expects to prove by the said witness Elijah Robbins, are as follows:

That on the evening of October 9th, the date of the commission of the homicide as alleged in this indictment, the said Elijah 82 Robbins who resides, or did reside at that time between the town of Spring, and the house of the defendant Marcellus Thomas, and the place where the homicide is alleged to have been committed at about six o'clock and not a great while before the time the homicide is alleged to have occurred, he saw the said John Blair and the said Ben Shropshire, whom the defendant is accused of killing as they rode passes his house going northward from the town of Spring and in the direction of the home of Marcellus Thomas, and the place where the homicide is alleged to have taken place; that they were hardly able to stay on their horses, because of their intoxication, that the said witness resides or did reside at that time, a distance of about three-fourths of a mile from the home of this defendant, and after the said Blair and Shropshire had passed the house of the defendant Marcellus Thomas, the defendant Marcellus Thomas came passed his house and stopped and talked with him, at his house; that at the time the defendant came to his house, after the said Blair and Shropshire has passed his house, the said defendant Marcellus Thomas, was on his way home, from town of Spring, and did not have with him or in his possession *on* a gun or weapon of any kind; that at the time the said defendant stopped at his house on his way home from Spring, he remained there in

conversation with him for several minutes, and then stated that he must go on home, as he had to go from there to John Bird's house to get a wedge, which he wanted to get that evening to be used early next morning.

Affiant further says, that the testimony of the said Elijah Robbins is material in this: that it is claimed and the defendant is informed that the State will endeavor to prove that he passed the said Blair and Shropshire on the road, between the house of the said witness Elijah Robbins and the house of Clemeal Thomas,
83 and that after passing them on the road, they having has some words with the defendant, as he passed them, he went hurriedly to his own house, and secured his shotgun and went out in the woods immediately north of and near his house on the side of the road, where the said Blair and Shropshire were then traveling and was hidding in ambush waiting for their appearance, and shot them from ambush, with the said shotgun, immediately after they passed his house; whereas, the defendant claims and will endeavor to show that the said Blair and Shropshire had passed his house before he reached his house, and that he had no knowledge of their being on the road north of his house, when he left his house with his gun, as he was on his way to John Bird's to transact some business to secure a wedge, as hereinbefore stated. Affiant further says that the diligence that he has used to secure the attendance of the witness Bob Edwards and Elmore George is as follows:

That on the 18th day of December 1905, he caused to be issued by the clerk of this court, a subpœna for the said witnesses and caused the same to be placed in the hands of the sheriff of Harris county to be executed, and that the said subpœna has been returned by the sheriff with a return endorsed thereon that the said witness could not be found within the county, which said subpœna and the return thereon is on file with the records in this case and the same is herewith presented for inspection as a part of this application; that the said witness-, were *residence* at the time of the issuance of the said subpœna of Harris county, so this affiant was informed and believes; that the facts which the defendant expects to prove by the said witnesses Bob Edwards and Elmore George, are as follows: That they are acquainted with the defendant Marcellus Thomas, and — was a peaceable quiet colored citizen and that they have known him
84 for years, and that his reputation in that respect is good.

The affiant further says that the said witness Annie Thomas, and the said witness Elijah Robbins and the said witnesses Bob Edwards and Elmore George are not absent by the procurement or consent of the said defendant. That this application is not made for delay; that there is no reasonable expectation that the attendance of said witnesses Annie Thomas, Elijah Robbins, Bob Edwards and Elmore George, or either of them can be procured during the present term of this court.

Premises considered, the defendant moves the court to grant the application for a continuance to the next term of court.

his
MARCELLUS x THOMAS,
mark.

Subscribed and sworn to before me this 21st day of December 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court
of Harris County, Texas,
By C. A. SMITH, *Deputy.*

Copies of said subpœna issued for said witnesses with the return of the officer thereon, as the same are now on file in this cause in this court, *as* hereto annexed and made a part of this bill of exceptions.

And the court having considered said motion for a continuance the same was by the court overruled and said continuance refused and the court then and there, forced, the defendant to proceed with the trial of said cause, to which ruling and action of the court defendant then and there excepted, and he now tenders this his bill of exceptions and asks that the same be signed, certified and filed as a part of the record in this cause.

Which is accordingly done, this 19th day of January, 1906.

J. K. P. GILLASPIE,
Judge of the Criminal District Court
of Harris County, Texas.

O. E. BRANCH.

85 *Copy of Subpœnas Attached to Application for Continuance.*

Subpœna, Out County, Felony.

The State of Texas to the Sheriff or any Constable of Hardin County, Greeting:

You are hereby commanded to summon Annie Thomas (Col'd) At Silsbee) If to be found in your county, to be and personally appear on the 21st day of December A. D. 1905 at 9 o'clock A. M. before the Honorable Criminal District Court of Harris County Texas, to be held within and for said county of Harris at the Court House thereof, in Houston, then and there to testify as—witness—on behalf of the State and the defendant in a certain criminal action (a felony case) in our said Court pending, wherein The State of Texas is plaintiff, and Marcellus Thomas is defendant No. 14,134 and there to remain from day to day, and from term to term until discharged by the court.

And you will deliver to said witness in person a true copy of this subpœna.

Herein Fail Not, and have you then and there before said Court this writ with your return thereon endorsed, showing how you have executed the same.

"A disobedience of this subpœna is punishable by fine not exceeding Five Hundred Dollars, to be collected as fines and costs in other Criminal Cases."

(The Bail Bond required of each of said witnesses is fixed at $100.00) Take Bond to Criminal Dist. Court.

Attest: O. E. REYNAUD,
Clerk of the Criminal District Court
of Harris County, Texas.

Given under my hand and seal of said court at office in Houston this the 12th day of December A. D. 1905.

O. E. REYNAUD,
Clerk Criminal District Court of
Harris County, Texas,
By C. A. SMITH, *Deputy.*

86 *Sheriff's Return.*

Came to hand on the 13th day of December, 1905, and executed by delivering a true copy of this subpœna to each of the below named witness-, at the time, dates, places, and in the manner following:

Date of service and advancement, ——; name of witness served with copy of subpœna —— ——; No. of miles, —; direction from — to —; fee for service, —; fee for mileage, —; amount advanced witness, —; total, — and not executed for reasons the within named witness not found said to be in Beaumont, Jefferson Co.

Total amount due sheriff.....$——

And not executed as to the witness —— ——, the diligence used in finding said witness —— —— being —— and the information received as to the whereabouts of said witness —— —— being, ——.

And I hereby affirm that the above return and all the facts therein contained are true in every particular; that the number of miles were actually and necessarily traveled as charged; that all the charges therein set out relate to the service of this subpœna only; that the amounts so advanced were so furnished witness upon affidavit of inability from lack of funds to obey the subpœna, and that the mileage therein charged has not been duplicated and is made according to law.

L. G. ROBERTS,
Sheriff Hardin County, Texas,
By B. A. COE, *Deputy.*

Sworn and subscribed to before me by —— ——, sheriff, on this the — day of ——, A. D. 190–.

—— ——.

87

File No. 14134.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

In the Criminal District Court, Harris County, Texas.

Subpœna.

Out County Witness —— ——, Felony.

For the D'f't.

Issued Dec. 12th, 1905.

O. E. REYNAUD,
Clerk Criminal District Court,
Harris County, Texas,
By C. A. SMITH, *Deputy.*

Filed Dec. 19th, 1905.

O. E. REYNAUD,
Clerk Criminal District Court,
Harris County, Texas,
By C. A. SMITH, *Deputy.*

Copy of Subpœna.

In the Criminal District Court, Harris County.

THE STATE OF TEXAS, *County of Harris:*

To the Sheriff or any Constable of Harris County, Greeting:

You are hereby commanded to summon Harmon Tautenhahn (Postmaster Westfield) Seal McDougal (Farmer) Eli Lamb (Farmer) Flora Ella Baldwin (Col.) Chas. Holworth (Farmer) at Spring, Henry West (Wood chopper) at Spring. E. Winche, S. Bender Frank Winche, Fred Winche, George Giddicks, Bob Edwards, Elmore George, Harmon Winche, Elijah Robbins, (Col.) Jeff Williams (Col'd) Lucy Silas, Victoria Lindley, John Bird Freeman Scott Dan Johnson, Zella Thomas, Monroe Jackson, Clemeal Thomas, Monroe Garner, Geo. Marshall, Henry Ford, Henry Jones.

88 If to be found in your County, to be and appear before the Honorable Criminal District Court, in and for Harris County, on Thursday December 21st, 1905 at nine o'clock, a. m. to give evidence in behalf of the State and the defendant, in a certain cause wherein the State of Texas, is plaintiff and Marcellus Thomas is defendant and there to remain from day to day and from term to term, until discharged by the court.

Herein fail not, and due return make of this writ. Witness my official signature, this 12th day of December, A. D. 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court
of Harris County,
By C. A. SMITH, *Deputy.*

Witness for defendant.

Criminal District Court.

No. 14134.

STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Subpœna.

Copy.

Came to hand on the 12th day of December 1905 and executed the 20th day of December 1905, by summoning the within named witness —— —— in person, in the county of Harris, and not executed as to the witness Bob Edwards, Elmore George and Elijah Robbins. the diligence used in finding said witness—being: Bob Edwards and Conroe, Elmore George, and Elijah Robbins, not found in Harris County.

And who after due search and diligent inquiry cannot be found in Harris County, Texas.

A. R. ANDERSON,
Sheriff of Harris County, Texas,
By J. L. TOWNSEND, *Deputy.*

Summoning — witnesses..... $——
Mileage — miles, at 5 cents..... ——
——
Total ..... $——

89 Filed January 19th, 1906.

O. E. REYNAUD,
Clerk of the Criminal District
Court of Harris Co., Texas,
By C. A. SMITH, *Deputy.*

Motion for a New Trial.

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Motion for a New Trial.

Now comes the defendant in the above entitled and numbered cause and moves the court to set aside the verdict of the jury and grant him a new trial herein for the following reasons to-wit:

1st. That the verdict is contrary to the law and is not supported by the evidence.

2nd. That the court erred in overruling defendant's motion to quash the indictment.

3rd. That the court erred in overruling defendant's motion to quash the special venire as shown by the record.

4th. That the court erred in overruling defendant's application for a continuance as shown by the bill of exception and the record.

5th. That the — erred in his charge to the jury in not fully and clearly charging the law upon all the facts and various charges of the case as developed by the evidence.

6th. That the court erred in admitting improper evidence over the objections of the defendant and in refusing evidence offered by the defendant, as show- by the record.

NOAH ALLEN,
Att'y for Def't.

90 Filed December 25th, 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

Order Granting Def't Leave to — Amended Motion for New Trial.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

FRIDAY, *December 29th,* 1905.

Leave is granted by the court for defendant to file an amended motion for a new trial herein.

Minute Book 12, Page 595.

Amended Motion for New Trial.

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS, Plaintiff,
vs.
MARCELLUS THOMAS, Defendant.

Amended Motion for a New Trial.

Now comes the defendant Marcellus Thomas, and by leave of court files this his amended motion for a new trial herein and moves the court to set aside the verdict of the jury heretofore rendered against him, and grant him a new trial herein, for the following reasons, to-wit:

91 First.

Because the court committed error prejudicial to the defendant in refusing to admit proper testimony on the hearing of defendant's motion to quash the indictment herein against this defendant tending to show the existence of his race prejudice and the unlawful discrimination against negroes or persons of African descent and this defendant in particular because of race, color and previous condition of servitude as shown by the bill of exceptions saved in the record and transcript of the hearing upon said motion. Which ruling was duly excepted to by the defendant at the time.

2nd.

That the court committed erre- prejudicial to the defendant in overruling the defendant's motion to quash the indictment presented and filed herein against him for the reasons assigned in said motion.

3rd.

That the court committed error prejudicial to the defendant in refusing to admit proper and legal testimony offered by the defendant upon the hearing of the motion of the defendant to quash the special venire herein, which ruling of the court was duly excepted to by the defendant at the time as shown by the record and bills of exceptions and saved upon said hearing.

4th.

That the court committed — prejudicial to the defendant in overruling and refusing to sustain the motion of the defendant to set aside and quash the special venire issued and the list of jurors
92 drawn in this cause, for the reasons set forth in said motion which was duly excepted to by the defendant at the time.

5th.

That the court committed error prejudicial to the defendant in refusing to grant the defendant a continuance of said cause upon his first application therefore, as shown by the record and the bill of exceptions taken at the time and filed herein.

Sixth.

That the Court committed error prejudicial to the defendant in admitting improper testimony offered on behalf of the State and objected to by defendant at the time, as shown by the defendant's bills of exceptions in the record and transcript of the evidence and hearing of said cause herein, Nos. 1, 2, 3, 4, 5, 6 & 7.

Seventh.

The court committed error prejudicial to the defendant in admitting the testimony of one John Eads as to the statement or alleged dying declarations of the deceased John Blair, over the objections of the defendant as shown by the record and the bill of exceptions and saved and filed herein, No. —.

Eighth.

93 Because the court erred and misdirected the jury as to the law in the charge given by the court and failed to fully, clearly and correctly charge the law applicable to the case as developed by the evidence upon the trial in this, to-wit:

(*a*) That the court misdirected the jury as to the law in defining the term "Malice aforethought" in the definition given by the court in its charge to the jury.

(*b*) That the court misdirected the jury as to the law in defining the term "express malice" as defined by the court in its charge to the jury.

(*c*) That the court misdirected the jury in defining the term "implied malice" in the definition given by the court in its charge to the jury.

(*d*) That the court misdirected the jury in his charge on "murder in the first degree" and failed to fully, clearly and correctly charge the jury as to the essential elements necessary to establish murder in the first degree.

(*e*) That the court misdirected the jury in his charge on "murder in the second degree" and failed to correctly, fully and completely charge the jury as to the essential elements and necessary proof to establish murder in the second degree in the charge given by the court upon murder in the second degree.

(*f*) That the court misdirected the jury in its charge to the jury on manslaughter, and failed to clearly, fully and correctly instruct the jury as to the essential elements and proof necessary to constitute manslaughter, and wholly failed — fully clearly and correctly define the expression "under the immediate influence of sudden passion" In connection with the instruction given to the jury in

the charge of the court on manslaughter, and wholly failed to fully, clearly and correctly charge the jury as to what constituted "provocation" in connection with the charge of manslaughter, and
94 as to what constituted "Adequate cause" in the charge to the jury on manslaughter, and failed to fully, clearly and correctly charge the jury upon adequate cause as designated and defined in article 595 of the Penal Code and in article 596 of the Penal Code, and in article 597 of the Penal Code, separately and distinctly as demanded by the facts developed on the trial.

(*g*) That the court misdirected the jury in its charge upon manslaughter in limiting the jury to the consideration of the provocation arising at the time of the shooting, and in failing to instruct the jury fully and clearly with reference to the provocation in connection with the first meeting of the parties and alleged attack upon the defendant, and with reference to "cooling time" in connection therewith, separate and apart from the second meeting of the parties and the alleged attack upon the defendant at the second meeting at the time of the shooting as demanded by the evidence, and in failing to charge the jury specifically and clearly upon the subject of manslaughter in connection with the first meeting of the parties and alleged attack upon the defendant and in failing to give a separate and distinct charge to the jury upon manslaughter and provocation in connection with the second meeting and alleged attack upon the defendant, separate and apart from the charge given in connection with the first meeting of the parties and alleged attack upon the defendant, as demanded by the evidence.

(*h*) In that the court erred and misdirected the jury in that part of its charge on manslaughter and provocation, which reads as follows:

"The act must be directly caused by the passion arising out of the provocation, and not provocation given by some *other*
95 person other than the par-y killed."

in that it limits the defendant to the provocation, if any, given by John Blair, the deceased, while the evidence discloses the fact that the deceased and one Ben Shropshire were acting together in making an attack upon the defendant and if there was any attack, provocation or adequate cause, it was through the joint action or co-operation of the said Ben Shropshire, and John Blair, the deceased, and the defendant had a right under the law to act upon the provocation given or offered by either the deceased or the said Ben Shropshire, and the jury should have been so informed by the charge of the court.

(*i*) That the court misdirected the jury in its charge upon manslaughter in affirmatively stating what does not constitute "adequate cause" and in failing to affirmatively charge the jury as to what would constitute "adequate cause" either as defined by the Penal Code or otherwise.

(*j*) That the court misdirected the jury as to the law applicable to the case in paragraph 8 of the court's charge to the jury which reads as follows:

"If you should find that said defendant, Marcellus Thomas, did shoot and kill said John Blair with the gun, but should determine from the evidence *that he is not* guilty of murder in either degree, then you will from the facts and circumstances in evidence consider whether or not he be guilty of manslaughter,"

in this that the charge as given to the jury requires the jury to determine from the evidence that the defendant is not guilty of murder in either degree, before they can consider the facts and circumstances to determine whether or not he is guilty of manslaughter, and the same fails to tell the jury or leave it to the jury to determine from the facts and circumstances whether
96 or not the defendant was guilty of manslaughter if they had a reasonable doubt as to the defendant's being guilty of murder in either degree, thus changing the rule and depriving the defendant of the benefit of a reasonable doubt and requiring the jury to determine from the evidence absolutely that he was not guilty of murder in either degree before they can consider the question of manslaughter.

(*k*) That the court misdirected the jury in paragraph 14 of the charge given which reads as follows:—

"If from the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express malice or implied malice, then you must give the defendant the benefit of such doubt and not find him guilty of a higher degree of murder than murder in the second degree."

in this that the court charges the jury that if they have a doubt as to whether it was express malice or implied malice they should give the benefit of the doubt to the defendant, and fails to tell the jury that if they have a doubt as to which degree of murder, they should give the defendant the benefit of the doubt as to the degree, and refers the doubt to the question of express or implied malice and not as to the degree of murder as the same should have been given by the court.

(*l*) That the court misdirected the jury as to the law of self-defense in that part of the court's charge in paragraph 16 which reads as follows:

"The jury must judge the defendant from his position and standpoint and thereby determine from all of the facts and circumstances, in evidence as they reasonably appear to him at the time, *whether his apprehension of death or serious bodily injury was reasonable,* and if so then find him not guilty,"

in that while the court charges the jury that they must judge the defendant from his position and standpoint and thereby determine from all of the facts and circumstances in evidence, as they
97 reasonably appeared to him at the time, the court limits the right of the defendant to act upon the reasonable appearance to him, and charges the jury that they must determine as to whether or not his apprehension of death or serious bodily injury was reasonable thus depriving the defendant of his right to act upon what reas-

onably appeared to him, by allowing the jury to determine the reasonableness of such appearances and his apprehensions. And in failing to charge fully on the law of self defense with reference to articles 675 and 676 the Penal Code separately.

(*m*) That the court misdirected the jury and failed to fully charge them as to the law applicable to the facts as developed by the evidence in paragraph 17 of the court's charge which reads as follows:

"And if you believe that at the time the defendant fired the fatal shot which killed the deceased, if it reasonably appeared to him that the deceased alone, or acting with one Ben Shropshire was making an attack on him, under circumstances which reasonably indicated an intention to kill or seriously injure him, the defendant, and if said attack was so made and either deceased or said Shropshire, or either of them, were then armed with a pistol or knife, one or both, that the same were calculated reasonably and probably to kill, then the law would presume that the deceased intended to murder him, said defendant, or do him serious injury,"

in this that the court failed to further explain to the jury in connection with that portion of the charge that the defendant would be justified in acting upon the belief that the said Blair or the said Shropshire, one or both, had a pistol or knife, or either, whether they did have such knife or pistol in fact or not, and by failing to so inform the jury, the charge was calculated to mislead and confuse the jury and lead them to believe that he was only justified
98 in acting in case the said Blair or the said Shropshire, one or both, in fact had a pistol or knife or either.

(*n*) That the court erred and misdirected the jury as to the law in paragraph 19 of the charge which reads as follows:

"No statement made by one under arrest can be used against him unless before he made the same he was warned that the same could or would be used in evidence against him, and was wholly voluntary, and you are instructed that if you find the defendant made a statement to one J. L. Townsend, as testified to by him you will not consider the same unless you find he was first warned and the same was made voluntarily by him, the said defendant."

in this that said charge was incorrect, insufficient and misleading in that the court failed to fully and clearly charge the jury as to what would constitute a voluntary statement, and failed to inform the jury that the defendant must not only have been warned, but that said statement if any was made, was not obtained by improper influence or obtained from the prisoner by means of compulsion or promises or any improper influence or inducement offered to the defendant for making such statements.

(*o*) That the charge on manslaughter, and the charge of the court on justification or self-defense, taken as a whole and together are so confusing and misleading as to mislead and confuse the jury with reference to the provocation which would constitute adequate cause and reduce the offense from murder to manslaughter and a justification or self-defense which would constitute a complete defense and entitle the defendant to an acquittal.

Nine.

That the verdict is contrary to law and is not supported by the evidence in this, to-wit:

99 (*a*) That the evidence *and* wholly fails and is insufficient to establish express malice beyond a reasonable doubt.

(*b*) That the evidence wholly fails and is insufficient to establish implied malice beyond a reasonable doubt.

(*c*) That the evidence wholly fails to warrant a conviction of the defendant of murder in the first degree or of murder in the second degree, and clearly establishes sufficient cause and provocation to reduce the offense, if any, so committed to manslaughter.

(*d*) That the evidence is insufficient and wholly fails to establish either murder or manslaughter, but, on the contrary, clearly shows that the defendant was acting in self-defense and was legally justified in so doing.

NOAH ALLEN,
Attorney for Defendant.

Filed Dec. 29th, 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court
of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

Order Overruling Motion for New Trial.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

FRIDAY, *December 29th*, 1905.

This day this cause being again called came on to be heard the amended motion of the defendant Marcellus Thomas to set aside the verdict and judgment rendered and entered herein, and grant

100 him a new trial in this cause and the State being present in court by her District Attorney and the defendant Marcellus Thomas being present in open court in person, with his counsel and the court having heard the said motion, is of the opinion that the same should be refused.

It is therefore considered, ordered and adjudged by the court that the said motion for a new trial herein be and the same is in all things refused and overruled, to all of which the said defendant in open court excepted, and in open court gave notice of appeal, to the Court of Criminal Appeals of Texas.

Which said notice is here now entered of record, and twenty days after the adjournment of the present term are allowed the parties to prepare and file a statement of the facts and bills of exceptions in this cause.

Minute Book 12, page 595.

Order for Special Venire.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

TUESDAY, *December 5th,* 1905.

This day came on to be heard the Oral Motion of the State for a Special Venire herein and the same having been heard and considered by the court, the said motion is granted, and it is ordered by the court that the clerk do forthwith issue a writ commanding the sheriff of this Harris County, Texas, to summon the seventy five persons whose names appear on the list, to be attached to said writ to be and appear before the Criminal District Court of said Harris County, Now in session at the Court House thereof in said county, on the 21st day of December A. D. 1905, at nine o'clock, a. m. which time is set for the trial of this cause, then and there to serve as jurors in the trial of said cause, which said writ
101 shall be returnable on the 19th day of December A. D. 1905, at nine o'clock A. M.

Minute Book 12, Page 572.

Motion to Quash Indictment.

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS, Plaintiff,
vs.
MARCELLUS THOMAS, Defendant.

Motion to Quash Indictment.

Now comes the defendant in the above entitled and numbered cause and moves the court to quash, set aside and hold for naught the indictment returned and filed herein against him, and as grounds for said motion, defendant respectfully represent-:

I.

That this defendant was not permitted to nor given an opportunity to appear before the grand jury so finding said bill of indictment against him, for the purpose of challenging the array thereof, objecting to the formation thereof, or to object to any person or persons composing the same and was thereby deprived of his right and privileges under the laws of the Constitution of the United States.

102

II.

That he is a negro or person of African descent, a resident citizen of the United States of America, and is charged in this indictment with killing one John Blair, who is a white person, that Harris County, Texas, has a population of about seventy five thousand people, twenty-five thousand of whom are negroes, or persons of African descent; that the voting population of Harris county is approximately twelve thousand, approximately four thousand of whom are negroes, or persons belonging to what is called the colored race; that the prejudice and ill feeling of the white race toward the negroes or persons of the colored race is so great in said county that the dominant political party of said county through whose organization all of the county and local elective officers are nominated and elected practically without opposition through its organization, wholly excludes from and prohibits the negro, or person of African descent, from participating in and voting at its party primaries for the nomination of its party candidates for the various elective offices within the county, and has so excluded all negroes from participating in its party primaries for a number of years last past; that there are now three civil and one Criminal District Court, and one county court in Harris County, in each of which a jury commission consisting of three persons is appointed at each term thereof by the presiding judges of said courts, whose duties are to select the persons as jurors in said courts; that, owing to the prejudice existing in the minds of the white people of the county against the negroes, or persons of African descent, it has been for years and now is considered object-able to select or appoint persons of African descent, or negroes, as jury commissioners in any of said courts and for more than ten years, last past, because of the

103 race prejudice against the negroes or persons of African descent, no negroes or persons of African descent have been appointed by any of the judges of said courts to serve as jury commissioners in any of said courts, notwithstanding approximately one fourth of the persons qualified for jury commissioners in said county are negroes or persons of African descent; that for a number of years last past, because of the prejudice existing against the negroes or persons of African descent, on account of their race, color and previous condition of servitude no negroes or persons of African descent have been drawn or selected by the jury commissioners to serve as jurors in the county court and the three civil district courts of said county, although one-fourth of all the qualified jurors, in said county are negroes or persons of African descent; that for a long period of years past and until the year 1900, the jury commission selected in and for the criminal district — of Harris county, in which court this indictment is now pending, wilfully discriminated against the colored race, or persons of African descent commonly known as negroes, because of their race, color, and previous condition of servitude, by purposely excluding the negroes or persons of African descent from serving upon the grand juries in said court and refusing to draw select or place any negroes or persons of African descent to serve on the grand jury in said court

at any *time* thereof during said long period of years, while one-fourth the persons qualified to serve as grand jurors in said county during all of said years, were negroes or persons of African descent; that for four or five years last past the jury commissioners selected in and for said criminal district court, while not absolutely excluding all negroes or persons of African descent from serving on the grand and petit juries, have wilfully and illegally discriminated against the colored race or persons of African descent by
104 purposely refusing to place all negroes or persons of African descent on the list of persons drawn and selected by said jury commissioners to serve as grand and petit jurors in said court at the various terms thereof, as the same was drawn or found in the selection of said lists and have intentionally left them off of said lists and excluded them from service as such grand and petit jurors, because of their race, color and previous condition of servitude, only placing, not to exceed one negro or person of African descent upon a grand jury, composed of twelve persons at any one time, as a ruse or pretense of fair treatment to the colored race, and excluding all other negroes drawn for said grand jury, because of their color, while practically one-fourth of the persons in said county, who were and are qualified to serve as grand jurors in said county, are negroes or persons of African descent.

III.

Defendant further says that because of the race prejudice and ill feeling existing against the negroes in Harris county, and against this defendant in particular on account of his color, and race, and because of the sentiment against placing negroes or persons of color, or of African descent upon the grand juries and petit juries in said county, and, especially, in said criminal district court as hereinbefore stated, the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro or person of African descent, and of the same race and color of this defendant, upon said grand jury, so finding and presenting said indictment against this defendant, notwithstanding the fact that one-fourth of the qualified grand jurors of said county are negroes or persons of African descent and this defendant has been and was thereby
105 discriminated against on account of his race, color and previous condition of servitude, and was then and thereby denied the equal protection of the laws and of his civil rights as guaranteed by the Constitution and laws of the United States, all of which defendant is ready to verify.

his
MARCELLUS x THOMAS,
mark.

Subscribed and sworn to by Marcellus Thomas before me this 21st day of December 1905.

NOAH ALLEN,
[SEAL.] *Notary Public for Harris County, Texas.*

NOAH ALLEN,
Att'y for Def't.

Filed December 21st, 1905.

O. E. REYNAUD,
Clerk of the Criminal Court
of Harris County, Tex.,
By C. A. SMITH, *Deputy.*

Motion to Quash Special Venire.

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS, Plaintiff,
vs.
MARCELLUS THOMAS, Defendant.

Motion to Quash Special Venire.

106 Now comes the defendant, Marcellus Thomas, and moves the court to quash and set aside the special *venire facias* issued and served herein, together with the list of jurors drawn and selected therein to serve in the above entitled cause and challenges the array of the whole body of jurors summoned in this cause, and, as grounds for said motion and challenges, respectfully states:

I.

That he is a negro or person of African descent, a resident citizen of the United States of America, and is charged in this indictment with killing one John Blair, who is a white person, that Harris County Texas has a population of about seventy-five thousand people, twenty-five thousand of whom are negroes, or persons of African descent; that the voting population of Harris County is approximately twelve thousand approximately four thousand of whom are negroes, or persons belonging to what is called the colored race, that the prejudice and ill-feeling of the white race toward the negroes or persons of the colored race is so great in said county that the dominant political party of said county, through whose organization all of the county and local elective officers are nominated and elected practically without opposition, through its organization, wholly excludes from and prohibits the negro, or persons of African descent, from participating in and voting at its party primaries for the nomination of its party candidates for the various elective offices within the county, and has so excluded all negroes from participating in

its party primaries for a number of years last past; That there are now three civil and one Criminal District Court, and one county court, in Harris County, in each of which a jury commission
107 consisting of three persons, is appointed at each term thereof by the presiding judges of said courts, whose duties are to select the persons to serve as jurors in said courts, that, owing to the prejudice existing in the minds of the white people of the county against the negroes, or persons of African descent, it has been for years and now is considered objectionable to select or appoint persons of African descent, or negroes as jury commissioners in any of said courts and for more than ten years last past, because of the race prejudice against the negroes or persons of African descent, no negroes or persons of African descent have been appointed by any of the judges of said courts to serve as jury commissioners in said courts, notwithstanding approximately one-fourth of the persons qualified for jury commissioners in said county are negroes or persons of African descent, on account of their race, color and previous condition of servitude, no negroes or persons of African descent have been drawn or selected by the jury commissioners to serve as jurors in the county court and the three civil district courts in said county, although one-fourth of all of the qualified jurors in said county are negroes or persons of African descent; that for a long period of years past and until the year 1900, the jury commission selected in and for the Criminal District Court of Harris County, in which court this indictment is now pending, wilfully discriminated against the colored race, or persons of African descent commonly known as negroes, because of their race, color, and previous condition of servitude, by purposely excluding negroes or persons of African descent from serving upon the grand juries in said court and refusing to draw, select or place any negroes or persons of African descent to serve on the grand jury in said court at any term thereof during said long period of years, while one-fourth the persons qualified to serve as grand jurors in said county, dur-
108 ing all of said years, were negroes or persons of African descent; that for four or five years last past the jury commissioners selected in and for said Criminal District Court, while not absolutely excluding all negroes or persons of African descent from serving on the grand and petit juries have wilfully and illegally discriminated against the colored race or persons of African descent by purposely refusing to place all negroes or persons of African descent on the list of persons drawn and selected by said jury commissioners to serve as grand and petit jurors in said court at the various terms thereof, as the same were drawn or found in the selection of said lists, and have intentionally left them off of said lists and excluded them from service as such grand and petit jurors, because of their race, color and previous condition of servitude, only placing, not to exceed one negro or person of African descent upon a grand jury, composed of twelve persons, at any one time, as a ruse or pretense of fair treatment to the colored race, and excluding all other negroes drawn for said grand jury, because of their color, while practically one-fourth of the persons in said county, who were and are qualified

to serve as grand jurors in said county, are negroes or persons of African descent.

II.

Defendant further says that because of the race prejudice and ill feeling existing against the negroes or persons of African descent in Harris County and against this defendant in particular on account of his color and race and because of the sentiment existing in said county against placing negroes or persons of African descent upon the grand and petit juries in said county, and especially in this the said Criminal District Court, as hereinbefore stated, the jury
109 commissioners appointed and selected by the judge of this court, all of whom are white persons, in selecting the names of persons to do jury service for this term of said court, and the names of persons to constitute a special *venire* list from whom shall be drawn the names of those persons who shall answer summons to the special *venire facias* as required by law have failed, neglected, and refused, to place upon said lists in drawing and making the same the names of all negroes or persons of African descent so found upon the tax rolls and other lists from which said names and said special *venire* list shall be prepared as the same, were found and drawn but intentionally excluded therefrom and failed to place all of the names of negroes or persons of African descent upon said list selected for service during the term and said special *venire* list as the same were drawn, because of their race, color and previous condition of servitude; that there are no negroes or persons of African descent upon the *venire* list of persons drawn to serve as jurors in this cause under the special order of the court as special *veniremen* said special *venire* or list of jurymen so drawn being composed exclusively of white persons all negroes or persons of African descent having been intentionally excluded and left off of said special *venire* or list of jurors drawn in this cause by the said jury commission because of their race, color and previous condition of servitude, notwithstanding the fact that one-fourth of the qualified jurors of said county are negroes or persons of African descent and this defendant has been and was thereby discriminated against on account of his race, color and previous condition of servitude, and was then and thereby denied the equal protection of the laws and of his civil rights as guaranteed by the Constitution and laws of the State of Texas and the constitution and laws of the United States, all of which defendant is ready
110 to verify.

NOAH ALLEN,
Att'y for Def't.

his
MARCELLUS x THOMAS,
mark.

Subscribed and sworn to before me this 21st of December 1905.
[SEAL.] NOAH ALLEN,
Notary Public for Harris County, Texas.

Filed Dec. 21st, 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

Defendant's First Application for a Continuance.

In the Criminal District Court of Harris County, Texas.

No. 14133.

STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Now comes the defendant, Marcellus Thomas, in the above entitled and numbered cause, and under oath makes this his first application for a continuance of said cause on account of the absence of Annie Thomas a material witness in his behalf, and who is not in attendance upon this court, and Elijah Robbins a material witness in his behalf, who is not in attendance upon this court, and Bob Edwards who is a material witness in his behalf, and who is
111 not in attendance upon this court, and Elmore George a material witness in his behalf, and who is not in attendance upon this court; and as grounds for the continuance represents to the court:

First. That the said Annie Thomas temporarily resides in Silsby Hardin County, Texas, that the diligence that has been used by this defendant to procure the attendance of said witness Annie Thomas at the trial of this cause, is as follows, to-wit: On the 12th day of December, 1905, defendant caused to be issued by the clerk of this court a subpœna for the said witness, and on the 13th day of December, 1905, caused the same to be placed in the Post Office duly and properly sealed and enclosed in an envelope, addressed to the sheriff of Hardin County, Texas, at Kountze, the county seal of said county, postage prepaid, which said subpœna was received by the said sheriff and has been returned into this court with his return endorsed thereon "Not served upon the said Annie Thomas for the reason that she could not be found," and that she was then supposed to be in Beaumont, Jefferson County, Texas, and is now on file with the records of this case, and the same is herewith presented to the court for its inspection, as a part of this appplication, that the facts which the defendant expects to prove by the said witness Annie Thomas are as follows viz: That on the evening of the alleged homicide charged in the indictment in this cause, she was at the home or residence of Clemeal Thomas, who resides only a short distance from the defend-

ant Marcellus Thomas, and on the public road leading from Spring northward passed the *passed the* house of the said Clemeal Thomas and Marcellus Thomas upon which the killing or homicide alleged in this case was alleged to have taken place and that while there, and sometime before the shooting was alleged to have taken place,
112 she saw the deceased John Blair and one Ben Shropshire, both of whom are alleged to have been killed by this defendant at the same time and place, pass the house of the said Clemeal Thomas, in a state of intoxication, using loud and boisterous language, cursing and swearing, and that after the said Blair and Shropshire had passed the house of Clemeal Thomas had had ample time to pass the house of the defendant Marcellus Thomas, and get some distance beyond his house on said highway, the defendant Marcellus Thomas came from the town of Spring, to the house of Clemeal Thomas where the said witness was at the time she saw the said Blair and Shropshire pass said house; that, at that time when the defendant Marcellus Thomas came to the house, and went from Clemeal Thomas' house to his own house, he did not then have with him a gun or weapon of any kind, and that he could not have gone from the house of Clemeal Thomas where she first saw him after Blair and Shropshire passed the house of Clemeal Thomas to his own house, and gotten out in the road or public highway, before the said Blair and Shropshire passed the home or house of the defendant Marcellus Thomas. Affiant further says that the said testimony is material in this—that he is informed and alleges the fact to be, that the State or prosecution claims and will endeavor to prove that the defendant had passed the said Shropshire and Blair on said public road before they reached the house of Clemeal Thomas, and had had some words or dispute with them, and after passing them had gone on to his own home, and secured his gun and gone out on the road or highway, just north of and near his own house, and was lying in wait for the said Blair and Shropshire, as they passed his house, and shot them from ambush, immediately after they had passed his house, as they came along the road, without notice or warning:

Whereas, defendant claims, and will endeavor to prove, that the
113 defendant had not seen the said Blair and Shropshire before they passed his house, and had had no words or difficulty with them, and did not go to his house and procure his gun for the purpose of renewing a difficulty with them, that he had had no trouble with them whatever and left his home to go to a neighbor's and had taken his gun with him and came in contact with the said Blair and Shropshire, after leaving his own house with his gun in his possession, not knowing that they were upon the road anywhere near his house or in that vicinity, and while he was on his way from his house to that of the neighbor some distance away on a matter of business, and when he met or overtook the said Blair and Shropshire in the road they began a controversy with him, threatening to do him bodily injury and personal violence, and ran him for some distance down the roadway, when he left the road and went into the woods to avoid contact with them, and waited for some time for them to pass on, and on his

return to the road, after having waited long enough for them to have gotten up the road, as he supposed they would do he unexpectedly came upon them sitting on the roadside waiting for him, and as soon as he approached, they made for him—one of them with a pistol and — other with a knife, one of them grabbing his horse by the bridle, when in order to defend himself from their assaults and to protect his own life or his body from personal violence and serious injuries, he used his gun in self defense. Affiant further says that the diligence which has been used by him to procure the attendance of the said witness Elijah Robbins at the trial of this cause, is as follows to-wit: On the 12th day of December, 1905, he caused to be issued by the clerk of this court, a subpœna for this witness, and caused the same to be placed in the hands of the sheriff of Harris County, Texas, in which county the said witness has resided, and did reside, so far as this defendant was informed, at the time of the issuance
114 of the said subpœna, which said subpœna has been returned into this court, by the said sheriff, and is now on file with the records of this case, and the same is herewith presented for inspection as a part of this application and which subpœna, or the return of the sheriff thereon shows that the said subpœna, was not served, because the said Elijah Robbins could not be found in the said county of Harris, that the facts which the said defendant expects to prove by the said witness Elija Robbins are as follows:

That on the evening of October 9th, the date of the commission of the homicide as alleged in this indictment, the said Elija Robbins who resides, or did reside at that time, between the town of Spring and the house of the defendant Marcellus Thomas, and the place where the homicide is alleged to have been committed, at about six o'clock and not a great while before the time the homicide is alleged to have occurred, he saw the said John Blair and the said Ben Shropshire, whom the defendant is accussed of killing, as they rode *passed* his house going northward from the town of Spring, and in the direction of the home of Marcellus Thomas, and the place where the homicide is alleged to have taken place; that they were then in a state of intoxication, cursing and swearing, and were hardly able to stay on their horses, because of their intoxication; that the said witness resides or did reside at that time, a distance of about three-fourths of a mile from the home of this defendant, and that after the said Blair and Shropshire had passed the house of the witness, and long enough for them to have passed the house of the defendant Marcellus Thomas, the defendant Marcellus Thomas came past his house and stopped and talked with him at his house; that at the time the defendant came to his house, after the said Blair and
115 Shropshire had passed his house, the said defendant Marcellus Thomas, was on his way home from the town of Spring and did not have with him or in his possession a gun or weapon of any kind; that at the time the said defendant stopped at his house, on his way home from Spring, he remained there in conversation with him several minutes, and then stated that he must go home, as he had to go from there to John Bird's house to get a wedge,

which he wanted to get that evening, to be used early the next morning.

Affiant further says, that the testimony of the said Elija Robbins is material in this: That it is claimed, and the defendant is informed that the State will endeavor to prove that he passed the said Blair and Shropshire on the road, between the house of the said witness Elija Robbins, and the house of Clemeal Thomas and after passing them on the road, they having had some words with the defendant, as he passed them, he went hurriedly to his own house, and secured his shot gun, and went out into the woods immediately North of and near his house on the side of the road, where the said Blair and Shropshire were then traveling and was hiding in ambush waiting for their appearance, and shot them from ambush, with the said gun, immediately after they passed his house, whereas, the defendant claims and will endeavor to show, that the said Blair and Shropshire had passed his house before he reached his home, and that he had no knowledge of their being on the road North of his house, when he left his house with his gun, as he was on his way to John Bird's to transact some business to secure a wedge, and as hereinbefore stated.

Affiant further says that the diligence that he has used to secure the attendance of the witness- Bob Edwards and Elmore George is as follows: That on the 12th day of December 1905 he caused to
116 be issued by the clerk of this court a subpœna for the said witness-, and caused the same to be placed in the hands of the sheriff of Harris County, to be executed, and that the said subpœna has been returned by the sheriff with a return endorsed thereon that the said witness- could not be found within the county, which said subpœna and the return thereon is on file with the records in this case and the same is herewith presented for inspection as a part of this application; that the said witnesses were residents at the time of the issuance of the said subpœna, of Harris County, so this affiant was informed and believed; that the facts which the defendant expects to prove by the said witnesses Bob Edwards and Elmore George, are as follows: That they were acquainted with the defendant Marcellus Thomas and with his reputation in the county in which he lives, and that it was as a peaceable quiet colored citizen and that they have known him for years, and that his reputation in that respect is good.

The affiant further says that the said witness Annie Thomas and the said witness Elijah Robbins and the said witness- Bob Edwards and Elmore George are not absent by the procurement or consent of the said defendant—that this application is not made for delay, that there is no reasonable expectation that the attendance of the said witnesses Annie Thomas, Elijah Robbins, Bob Edwards and Elmore George, or either of them can be procured during the present term of this court.

Premises considered, the defendant moves the court to grant the application for a continuance to the next term of court.

his
MARCELLUS x THOMAS,
mark.

Subscribed and sworn to before me this 21st day of December 1905.

117 O. E. REYNAUD,
Notary Public in and for Harris County, Texas,
[SEAL.] By C. A. SMITH, *Deputy.*

Filed December 21st, 1905.

O. E. REYNAUD,
Clerk of the Criminal District — of Harris Co., Tex.,
[SEAL.] By C. A. SMITH, *Deputy.*

Pauper's Oath for Statement of Facts.

In the Criminal District Court of Harris County, Texas.

No. 14133.

STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Affidavit.

STATE OF TEXAS, *County of Harris, ss:*

Marcellus Thomas being first duly sworn, says that he is the defendant in the above entitled cause, that by reason of his poverty he has no money and is unable to pay for the transcript of the evidence and proceedings had in the above and entitled and numbered cause, on the hearing of the motions and the trial thereof.

his
MARCELLUS x THOMAS,
mark.

Subscribed and sworn to before me this 29th day of December, A. D. 1905.

O. E. REYNAUD,
Clk C. D. C. H. C.,
[SEAL.] By C. A. SMITH, *Deputy.*

118 Filed December 29th, 1905.

O. E. REYNAUD,
Clerk of the Criminal District
Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

Order for Statement of Facts.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

FRIDAY, *December 29th*, 1905.

This day came on to be heard the defendant's oral application for a statement of the facts in the trial of this cause at this December term 1905, which said case has been appealed by the defendant to the Court of Criminal Appeals of Texas and the defendant having filed his affidavit that he is too poor to pay for a statement of the facts herein, the said application and the affidavit having been heard and considered by the court, it is ordered and adjudged by the court that the official stenographer of this court do furnish the defendant herein a statement of the facts taken in the trial of this cause at this December Term 1905, in accordance with the law in such cases made and provided.

Minute Book 12, Page 596.

119 *Assignment of Errors.*

In the Criminal District Court of Harris County, Texas.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Assignment of ERRORS.

Now comes the defendant Marcellus Thomas, and files this his assignment of errors, in the above entitled and numbered cause and alleges that the court committed error prejudicial to the defendant on the hearing of the defendant's motion to quash the indictment, and the special venire and upon the trial of said cause as follows:

1.

That the court erred in refusing to admit proper testimony offered by the defendant on the hearing of the defendant's motion to quash the indictment and his motion to quash the special venire in this, that the court refused to allow and permit the defendant to show by the witness A. R. Anderson, and the witness Vin H. McKinney that it had been the custom of the dominant political party through and by whom all of the local and county officers are nominated and elected, in Harris County, Texas, for the past several years to dis-

criminate against and exclude all negroes or persons of African descent from participating in and voting at the primary election held by the dominant political party in the said county, because of their race, color and previous conditions, of servitude as shown by defendant's bill of exceptions in the record and transcript of the hearing of said motions reserved in said transcript, and shown on pages 2 & 3 and 41 of said transcript, statement of facts, and bill of exceptions reserved on the hearing of said motions.

120 2.

That the court erred in overruling defendant's motion, to quash the indictment filed against him for the reasons assigned in said motion.

3.

That the court erred in overruling defendant's motion to quash and set aside the special venire in said cause, for the reasons as assigned in said motion.

4.

That the court erred in overruling defendant's motion for a continuance and refusing to continue said cause upon defendant- written application as shown by the record and bill of exceptions taken and filed herein.

5.

That the court erred in admitting improper testimony offered on behalf of the State on the trial of said cause over the objection of the defendant as shown by the defendant's several bills of exceptions which — in the transcript and statement of facts filed herein, pages 46 & 47 & 48 & to 54 inclusive.

6.

That the court erred in admitting the testimony of John Eads as to the statements and alleged dying declarations of the deceased John Blair on trial of said cause over the objections of the defendant as shown by the record and bill of exceptions duly reserved
121 and filed herein, as appearing on pages 46, 47, 48, 49 & to 54 inclusive of said transcript and statement of facts.

7.

That the court erred and misdirected the jury as to the law in the charge given by the court, and failed to fully, clearly and correctly charge the law applicable to the case as developed by the evidence upon the trial, in this to-wit:

(*a*) That the court misdirected the jury as to the law in defining the term "Malice Aforethought" in the definition given by the court in its charge to the jury.

(*b*) That the court misdirected the jury as to the law in defining the term "Express Malice" as defined by the court in its charge to the jury.

(c) That the court misdirected the jury in defining the term "Implied Malice" in the definition given by the court in its charge to the jury.

(d) That the court misdirected the jury in his charge on "murder in the first degree" and failed to fully, clearly and correctly charge the jury as to the essential elements necessary to establish murder in the first degree.

(e) That the court misdirected the jury in its charge on "murder in the second degree" and failed to correctly, fully and completely charge the jury as to the essential elements and necessary proof to establish murder in the second degree in the charge given by the court upon murder in the second degree.

(f) That the court misdirected the jury in his charge to the jury on manslaughter, and failed to clearly, fully and correctly instruct the jury as to the essential elements and proof necessary to constitute manslaughter, and wholly failed to fully, clearly and cor-
122 rectly define the expression "under the immediate influence of sudden passion" in connection with the instruction given to the jury in the charge of the court on manslaughter, and wholly failed to fully, clearly and correctly charge the jury as to what constituted "provocation" in connection with the charge of manslaughter, and as to what constituted "adequate cause" in the charge to the jury on manslaughter, and failed to fully, clearly and correctly charge the jury upon adequate cause as designated and defined in Article 595 of the Penal Code, Article 596 of the Penal Code and in Article 597 Penal Code separately and distinctly as demanded by the facts developed on the trial.

(g) That the court misdirected the jury in its charge upon manslaughter in limiting the jury to the consideration of the provocation arising at the very time of the shooting, and failing to instruct the jury fully and clearly with reference to the provocation in connection with the first meeting of the parties and alleged attack upon the defendant and with reference to "cooling time" in connection therewith, separate and apart from the second meeting of the parties and the alleged attack upon the defendant at the second meeting at the time of the shooting as demanded by the evidence, and failing to charge the jury specifically and clearly upon the subject of manslaughter in connection with the first meeting of the parties and alleged attack upon the defendant and in failing to give a separate and distinct charge to the jury upon manslaughter and provocation in connection with the second meeting and alleged attack upon the defendant, separate and apart from the charge given in connection with the first meeting of the parties and alleged attack upon the defendant, as demanded by the evidence.

(h) In that the court erred and misdirected the jury in that part of its charge on manslaughter and provocation, which reads
123 as follows:

"The act must be directly caused by the passion arising out of the provocation, and not provocation given by some other person other than the party killed."

in that it limits the defendant to the provocation, if any, given by

John Blair the deceased, while the evidence discloses the fact that the deceased, and one Ben Shropshire were acting together in making an attack upon the defendant, and that if there was any attack provocation or adequate cause, it was through the joint actions or cooperation of the said Ben Shropshire and John Blair, the deceased and the defendant had a right under the law to act upon the provocation given or offered by either the deceased or the said Ben Shropshire, and the jury should have been so informed by the charge of the court.

(*i*) That the court misdirected the jury in its charge upon manslaughter in affirmatively stating what does not constitute "adequate cause" and in failing to affirmatively charge the jury as to what facts would constitute "adequate cause" either as defined by the Penal Code or otherwise.

(*j*) That the court misdirected the jury as to the law applicable to the case in paragraph 8 of the court's charge to the jury, which reads as follows:

"If you should find that said defendant, Marcellus Thomas, did shoot and kill said John Blair with the gun, but should determine from the evidence *that he is not* guilty of murder in either degree, then you will from the facts and circumstances in evidence consider whether or not he be guilty of manslaughter,"

in this that the charge as given to the jury requires the jury to determine from the evidence that the defendant is not guilty of murder in either degree, before they can consider the facts and circumstances to determine whether or not he is guilty of manslaughter, and the same fails to tell the jury or leave it to the jury to determine from the facts and circumstances whether or not the defendant was guilty of manslaughter if they had a reasonable doubt as to, the
124 defendant's being guilty of murder in either degree, thus changing the rule and depriving the defendant of the benefit of a reasonable doubt and requiring the jury to determine from the evidence absolutely that he was not guilty of murder in either degree before they can consider the question of manslaughter.

(*k*) That the court misdirected the jury in paragraph 14 of the charge given which reads as follows:

"If from the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express malice or implied malice, then you must give the defendant the benefit of such doubt and not find him guilty of a higher degree of murder than murder in the second degree."

in this the court charges the jury that if they have a doubt, as to whether it was express malice or implied malice they should give the benefit of the doubt to the defendant, and fails to tell the jury that if they have a doubt as to which degree of murder, they should give the defendant the benefit of the doubt as to the degree, and refers to the doubt as to the question of express or implied malice and not as to the degree of murder as the same should have been given by the Court.

(*l*) That the court misdirected the jury as to the law of self

defense in that part of the court's charge in paragraph 16 which reads as follows:

"The jury must judge the defendant from his position and stand point and thereby determine from all the facts and circumstances in evidence as they reasonable appear to him at the time, *whether his apprehension of death or serious bodily injury was reasonable* and if so then find him not guilty,"

in that while the court charges the jury that they must judge the defendant from his position and standpoint and thereby determine from all of the facts and circumstances in evidence, as they reasonably appear to him at the time, the court limits the right of the defendant to act upon the reasonable appearance to him, and charges the jury that they must determine as to whether or not his
125 apprehension of death or serious bodily injury was reasonable, thus depriving the defendant of his right to act upon what reasonably appeared to him, by allowing the jury to *to* determine the reasonableness of such appearance and also failed to fully charge the law on self-defense with reference to Article 675 and 677 of the Penal Code separately.

(*m*) That the court misdirected the jury and failed to fully charge them as to the law applicable to the facts as developed by the evidence in paragraph 17 of the court's charge which reads as follows:

"And if you believe that at the time the defendant fired the fatal shot which killed the deceased, if it then reasonably appeared to him, that the deceased alone or acting with Ben Shropshire, was making an attack on him, under circumstances which reasonably indicated an intention to kill or seriously injure him, the defendant, and if said attack was so made and either deceased or said Shropshire, or either of them, were then armed with a pistol or knife, one or both, that the same were calculated reasonably and probably to kill, then the law would presume that the deceased intended to murder him, said defendant or do him serious injury,"

in this that the court failed to further explain to the jury in connection with that portion of the charge that the defendant would be justified in acting upon the belief that the said Blair or the said Shropshire, one or both, had a pistol or knife, or either, whether they did have such a knife or pistol in fact or not, and by failing to so inform the jury, the charge was calculated to mislead and confuse the jury and lead them to believe that he was only justified in acting in case the said Blair or the said Shropshire, one or both, in fact had a pistol or knife or either.

(*n*) That the court erred and misdirected the jury as to the law in paragraph 19 of the charge which reads as follows:

"No statement made by one under arrest can be used against him unless before he made the same he was warned that the same could or would be used in evidence against him, and was wholly voluntary, and you are instructed that if you find the defendant made a statement to one L. Townsend as testified to by him, you will not consider the same unless you find he was first warned and the same was made voluntarily by him, the said defendant."

126 in this that said charge was incorrect, and insufficient and misleading in that the court failed to fully charge the jury as to what would constitute a voluntary statement, and failed to inform the jury that the defendant must not only have been warned, but that said statement if any was made, was not obtained by improper influence or obtained from the prisoner by means of compulsion or promises or any improper influence or inducement offered to the defendant for making such statements.

(*o*) That the charge of the court on manslaughter and the charge of the court on justification or self defense, taken as a whole and together are so confusing and misleading as to mislead and confuse the jury with reference to the provocation which would constitute adequate cause and reduce the offense from murder to manslaughter and a justification or self-defense which would constitute a complete defense and entitle the defendant to an acquittal.

8.

That the court erred in overruling the defendant's motion for a new trial for the reason assigned and set forth in said motion.

NOAH ALLEN,
Attorney for Defendant.

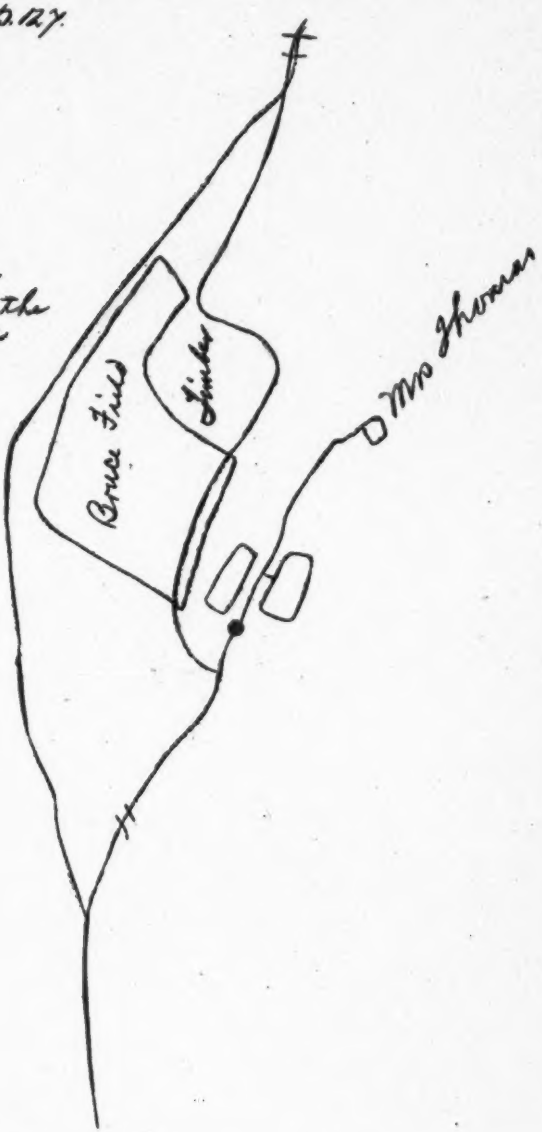
Filed January 30th, 1906.

O. E. REYNAUD,
Clerk of the Criminal District Court
of Harris County, Texas.
By C. A. SMITH, *Deputy.*

(Here follow diagrams marked pp. 127 & 128.)

No 105.
Thomas
Texas
p. 127.

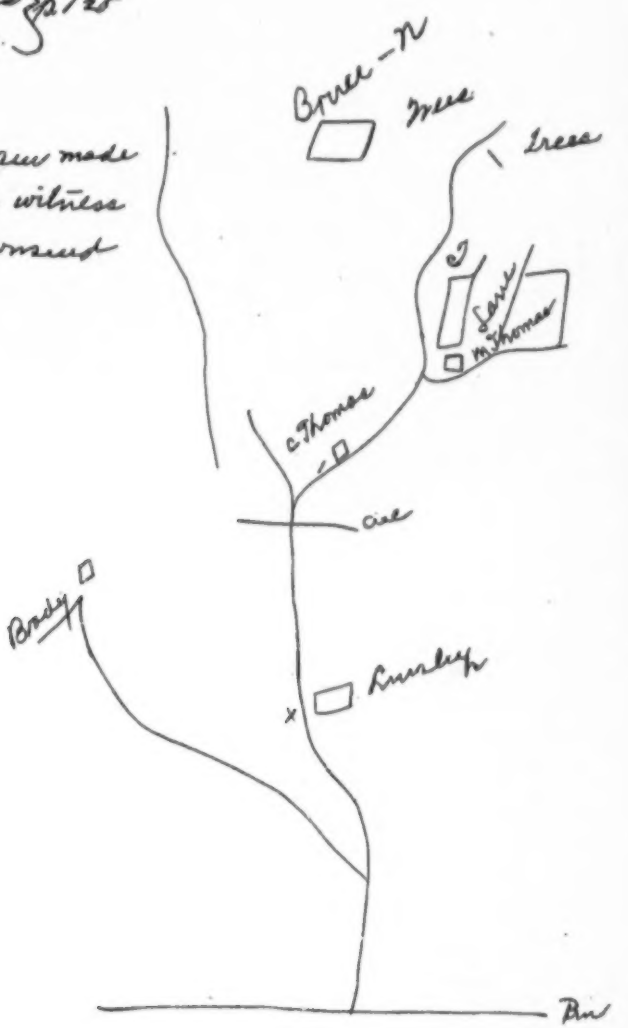
Diagram made by the defendant



Filed December 22nd, 1908, O. E. Reynaud, Clerk of the Criminal District Court of Harris Co.Tex., By C.A.Smith Deputy.

No. 105.
Thomas
vs
Texas.

Diagram made by the witness H. E. Townsend



Filed December 22nd, 1905.
O. E. Reynaud, Clerk of the Criminal District Court of Harris Co. Tex.,
By C.A.Smith, Deputy.

129 *Request to Forward Transcript.*

In the Criminal District Court, Harris County, Texas.

No. 14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

To the Clerk of said Court:

You are hereby requested to forward the transcript of the record in this case on appeal, to the Court of Criminal Appeals of the State of Texas, now in session at Dallas Texas.

W. C. OLIVER,
Criminal District Attorney.

Filed January 26th, 1905.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris Co., Tex.,
By C. A. SMITH, *Deputy.*

130 *Clerk's Certificate.*

THE STATE OF TEXAS, *County of Harris:*

I, O. E. Reynaud, Clerk of the Criminal District Court of Harris County, Texas, hereby certify that the foregoing one hundred and twenty nine pages of writing, contain a full, true and complete transcript of all the proceedings (except the statement of facts) had in a certain cause tried at the December Term 1905 of said court wherein the State of Texas was plaintiff and Marcellus Thomas was defendant as the same appears of record and on file in my office.

Witness my hand and seal of office in Houston, Texas, this the 29th day of January, 1906.

O. E. REYNAUD,
Clerk of the Criminal District Court of Harris County, Texas,
[SEAL.] By C. A. SMITH, *Deputy.*

Endorsed: #3166. 5th Assignment. Marcellus Thomas, Appellant, *vs.* The State of Texas, Appellee. From Harris County, O. E. Reynaud, Clerk Criminal District Court, Harris County, By C. A. Smith, Deputy. Filed in Court of Criminal Appeals at Dallas, Feb. 2d, 1906, J. M. Gaston, Clerk. Filed in Court of Criminal Appeals at Austin, Texas, March 28th, 1906, E. P. Smith, Clerk.

131 *Statement of Facts.*

In the Criminal District Court of Harris County, Texas, December Term, 1905.

#14133.

THE STATE OF TEXAS
vs.
MARCELLUS THOMAS.

Transcript of the Testimony.

Be it remembered that on the trial of the above entitled and numbered cause, which trial took place in the above styled court on the 21st, 22d, and 23rd days of December, A. D. 1905, the following is a full and complete transcript of the testimony given therein:

Testimony on the Part of the State.

Dr. J. C. SELLERS, called as a witness by the State, first duly sworn, testified as follows:

Ques. What is your name?
Ans. Dr. J. C. Sellers.
Ques. You live in Spring, Texas?
Ans. Yes sir.
Ques. You are a physician and surgeon?
Ans. Yes sir.
Ques. How long have you practiced medicine, Doctor?
Ans. Since 1888.
Ques. Where were you qualified to practice?
Ans. In the Medical Department of the University of Louisville, Ky.
Ques. You have practiced in this State since 1888?
Ans. Yes sir.
Ques. Did you know John Blair in his life time?
Ans. Yes sir, very well.
Ques. Do you know the defendant, Marcellus Thomas?
Ans. Yes sir.
Ques. Where did the defendant live with reference to the station or town of Spring?
Ans. Well, he lives about a mile from the depot.
Ques. In what direction?
Ans. Northwest.
Ques. Do you know where the road is that goes in the direction of Wilburton from Spring, do you know the general direction?
Ans. It is a northwest course.
Ques. With reference to that road, is he on or near that road?
Ans. Yes sir.

132 Ques. Near the Wilburton road out of Spring, leading northwest?
Ans. Yes sir.
Ques. Were you called to see John Blair—did you see him?
Ans. Yes sir.
Ques. About the 9th of October of this year?
Ans. Yes sir.
Ques. Where did you see him doctor?
Ans. Well, I saw him about 100 yards from the Wilburton road (I didn't measure it) but about 100 yards from the road in an old abandoned field.
Ques. Near a fence?
Ans. Near a fence.
Ques. Do you know what place that fence surrounds?
Ans. Well, it is Ed Rollins——
Ques. Known as the David Bruce place?
Ans. Yes sir.
Ques. Now, the corner of the fence near which you found him is something like 100 yards west of the Wilburton road?
Ans. Yes sir, very nearly west.
Ques. What was his condition when you found him?
Ans. He was very badly wounded.
Ques. Was it daylight or dark?
Ans. Dark.
Ques. Describe his wound to the jury, doctor?
Ans. Well his hand was very badly—his left hand was very badly mangled; fingers were in a manner entirely torn off—two front fingers; his thumb was all torn to pieces, he had 27 shot in left side ranging from collar bone down to the lower edge of the liver.
Ques. Is he living or dead?
Ans. He is dead.
Ques. How soon after you found him in the condition which you have just described, did he die?
Ans. He died—this was Monday night—I think he died Tuesday night between one and two o'clock.
Ques. That was October 11th, 1905?
Ans. Yes sir.
Ques. Now at the point where you found him, is that in Harris county?
Ans. Yes sir.
Ques. State of Texas?
Ans. Yes sir.
Ques. Now, what did you do with him, doctor, when you found him?
Ans. Well, I had him put in a wagon and taken to my office.
133 Ques. Did he die at your office?
Ans. Yes sir.
Ques. You fixed a bed there for him?
Ans. Yes sir.
Ques. Now, doctor, could you tell from the range of the wounds

from what direction the shot entered, whether from the right or left; assuming that he was facing northwest going out the Wilburton road from Spring, did they enter from the right or from the left?

Ans. They entered from the right.

Ques. From the direction, then, as if a person was standing on the right hand side of the road?

Ans. Yes sir.

Ques. What caused his death, doctor?

Ans. The gun shot wound.

Ques. That gun *w*hot wound you have described?

Ans. Yes sir.

Ques. Was he or not conscious? able to talk?

Ans. Yes sir, he was conscious, he knew everybody.

Ques. He was able to talk?

Ans. Yes sir, he was.

Ques. Was you called to see any one else at the same time?

Ans. Yes sir.

Ques. Who?

Ans. Mr. Ben Shropshire.

Ques. Where did you first see him on that night?

Objected to by defendant's counsel because defendant is not on trial for killing Shropshire.

State's COUNSEL: We offer it as a part of the *res gestæ*.

The COURT: The objection is overruled.

Defendant's counsel excepted to the ruling of court.

Ques. Go ahead, doctor?

Ans. I found him about—just about 600 yards from my house.

Ques. Where was he?

Ans. Right on the same road, the Wilburton road.

Ques. Was he at the time you found him at a point north or south of the house of defendant Thomas?

Ans. I would call it southeast of his house.

Ques. Towards Spring?

Ans. Yes sir.

Ques. What was he doing?

Ans. At the time I found him he was lying there bleeding.

Ques. Did you take him, remove him to your office?

Ans. Yes sir.

Ques. Where was he wounded?

Ans. In his right arm; his right arm was shot and mangled.

134 Ques. Is he living or dead?

Ans. He is dead.

Ques. How soon after you found him in the condition *to* have stated did he die?

Ans. Well, on Wednesday night he was sent to the Infirmary here in Houston, and I believe he died Friday morning (I don't know).

Ques. Did you see him after he was dead?

Ans. No sir.

Ques. You didn't attend the funeral?

Ans. No sir.

Ques. With reference to the shots, the wound on Shropshire, de-

scribe that wound, doctor, describe that wound to the jury, to what extent did it tear away the arm?

Ans. Well, it was nearly all torn off, the bone was broken, a very little part of muscle and skin remained intact.

Ques. Well, now, up to the time that Blair died where was Shropshire?

Ans. He was there at my office.

Ques. Were they on the same mattress or separate, or how did you provide for them?

Ans. Well, at first we had to do the best we could, and we put them on one mattress, but afterwards we made a change.

Ques. And put them on separate mattresses to be more comfortable?

Ans. Yes sir.

Ques. Was he there when Blair died?

Ans. Yes sir.

Ques. Still there in the office?

Ans. Yes sir.

Ques. Now, where did Blair die?

Ans. In the room next to the drug-store used for my office.

Ques. What county and state was that in?

Ans. In Harris County, State of Texas.

Ques. What direction, doctor, from the indication of the wound, from what direction did the shots enter the arm of Mr. Shropshire with reference to the right or the left of a man facing that Wilburton road going towards Wilburton from Spring?

Ans. They came from the right.

Ques. The same direction as the others?

Ans. Yes sir.

Ques. Doctor, what was the character of the shots with reference to each other, were they the same or different?

Ans. Well, I believe from the character of the wound made
135 in Blair's body, they were a size large.

Ques. A size larger?

Ans. Yes sir.

Ques. What did you find, if anything besides the shots in the wounds of either Blair of Shropshire?

Ans. Dr. Collins trimmed and dressed Mr. Blair's hand, and I assisted him in it. I don't know that he found anything in Mr. Blair's hand.

Ques. What about Mr. Shropshire—any gun wads?

Ans. We took out all three of the wads that were in the wound.

Ques. That is, in Mr. Shropshire's wound?

Ans. Yes sir.

Ques. Now with reference to the wound in Mr. Blair's side, did you find any wad?

Ans. No sir.

Ques. All the wads were in the wound of Mr. Shropshire?

Ans. Yes sir.

Ques. Did you examine the body of Blair to know whether he had any arms or not?

Ans. No sir, I didn't, but Mr. Townsend searched him when I got him to the office, I was present when he searched him.

Ques. State whether or not he had any arms?

Ans. I didn't see any.

Ques. Did he have any—*was they* any taken off from him?

Ans. No sir.

Ques. Now, did you see Shropshire searched too?

Ans. Yes sir.

Ques. Did you see whatever he had in his pockets?

Ans. I didn't see anything.

Ques. I say did you see, did you look to see whether he had any arms?

Ans. I was present, but Mr. Townsend did the searching.

Ques. Did you remove his clothes?

Ans. Yes sir.

Ques. If he had had any weapon you would have seen it; from the examination made, you would have known it?

Ans. Certainly.

Ques. Did you see any at all?

Ans. No sir.

Ques. Did you notice anything about Blair's bridle reins?

Ans. Yes sir, it was shot in two just about where a man would hold the bridle reins.

Ques. Now, doctor, do you shoot shot guns much in hunting?

Ans. Yes sir, I have shot right smart.

Ques. Can you tell from the compactness of a charge of shot from the direction it strikes whether the shot was fired—was in a
136 straight line carrying forwards?

Ans. Yes sir, I believe I could.

Ques. Now, take these shots, did they strike with comparative compactness?

Ans. Yes sir, very close.

Ques. What would that indicate, doctor, with reference to the distance from which the gun was shot, would it indicate or not that it was close by?

Ans. Yes sir, certainly.

Ques. Did you make any examination for tracks out there, doctor?

Ans. No sir, I never went back.

Ques. Who did you meet out where Blair's body was found?

Ans. I met Mr. H. E. Townsend, he got to him just a little bit before I did, he was riding a bicycle, and I was in a buggy.

Ques. Do you remember what time it was when you got to Shropshire, or did you get to him first?

Ans. Yes sir.

Ques. You found him between where Blair was and along the road?

Ans. Yes sir.

Ques. Did you see any sign of blood about where he was?

Ans. Yes sir.

Ques. About what time was it you reached Shropshire?

Ans. After dark, between 7 and 8 o'clock.

Ques. Did you hear the shots fired, doctor?
Ans. I heard two shots fired about that time of night; I don't know whether it was those two shots or not.
Ques. With reference to the direction which you afterwards learned this shooting took place, where was the sound?
Ans. It was in that direction.
Ques. Describe the shots to the jury with reference to whether they were close together or far apart?
Ans. Well, they were in rapid succession.
Ques. One right after the other?
Ans. Yes sir.
Ques. When you got to where Shropshire was, did you see any signs of weapons around there?
Ans. No sir.
Ques. Did you see any signs of any about Blair?
Ans. No sir.
Ques. You didn't take any statement down, did you?
Ans. I didn't take any statement down, but I heard him make a statement.
Ques. Who made the statement?
Ans. Mr. Shropshire.

137 Cross-examination:

Ques. How far was the body of Blair when you first saw it from the house of the defendant?
Ans. I should judge between 300 and 400 yards from his house.
Ques. North or northwesterly?
Ans. Northwesterly.
Ques. In a northwesterly direction?
Ans. Yes sir.
Ques. Do you know the lay of the land there; is there a lane there north from his house?
Ans. There is a lane there.
Ques. Directly north?
Ans. No sir, it is not directly north, it runs north and south.
Ques. How was it, north of that lane?
Ans. Nearly west of that lane.
Ques. Away farther north than the end of that lane?
Ans. Yes sir.
Ques. Farther north than the end of that lane?
Ans. Yes sir.
Ques. How much fa-ther north?
Ans. Very little.
Ques. How much west?
Ans. Nearly the same distance where we found him as it was from his house.
Ques. Nearly the same distance from the north end of that lane as it was from the Thomas house, where you found Blair?
Ans. Yes sir.
Ques. It was about the north end of the lane?
Ans. Yes sir, and west of the lane.
Ques. It was very nearly to the north——

Ans. Yes sir, a little above it.
Ques. Where was Shropshire when you first saw him?
Ans. He was on the road.
Ques. At anybody's house?
Ans. Near Lindsley's house.
Ques. Geo. Lindsley's house?
Ans. Yes sir.
Ques. Who was there when you got there and found Shropshire?
Ans. Lindsley and his wife.
Ques. Any one else?
Ans. Camile Thomas was with me driving; he came for me and rode back with me in the buggy.
Ques. Did you see Ed Rolland there?
Ans. Yes sir.
Ques. Did he come after you also?
Ans. No sir.
Ques. Where did you see him?
Ans. I saw him with Blair.
Ques. He was right at Blair when you got there?
Ans. Yes sir.
Ques. You say the wounds indicated that the shots were received from the right side of the road as they were going north?
138 Ans. Yes sir.
Ques. The right arm of Mr. Shropshire was shot?
Ans. Yes sir.
Ques. Was he shot in the arm or in the shoulder?
Ans. In the arm.
Ques. Which side of Blair, right or left side?
Ans. The left side.
Ques. Blair's left side?
Ans. Yes sir.
Ques. You say the wads from the gun were found in the arm of Shropshire?
Ans. Yes sir.
Ques. Only shot were found in the body of Blair?
Ans. I didn't see any shot, I saw where they went in.
Ques. Which hand was it of Blair was shot, the right or left?
Ans. The left hand.
Ques. Where was it the reins were cut, you say?
Ans. They were shot in two.
Ques. Are you a judge of about where he was holding the reins with his hand?
Ans. Yes sir.
Ques. How long did you remain with Blair and Shropshire after you met them?
Ans. I remained there all night.
Ques. Did they remain at Lindsley's house any length of time?
Ans. I remained there with them.
Ques. Was Blair taken to Lindsley's house?
Ans. No sir, he was taken to my office.
Ques. Was it near Lindsley's house or in the road?
Ans. In the road.

Ques. How close to Lindsley's house?
Ans. Well, it was dark, but I judge 80 or 90 yards from the house.
Ques. Did Mr. Shropshire go in the house or was he taken to the house at all?
Ans. No sir.
Ques: You went from the house to go out to where he was?
Ans. Yes sir.
Ques. Who all were with you after Blair and Shropshire were taken to your office?
Ans. I don't know, quite a number of people were there, some strangers.
Ques. Did Mr. Townsend go out with you when you went out there?
Ans. No sir, he didn't go out with me, we got together there when we found Shropshire. He went the regular Wilburton road, and I went out a different road.
Ques. You met there in front of Lindsley's house?
Ans. Yes sir, by the side of the road.
139 Ques. Near where Mr. Shropshire was?
Ans. Yes sir.
Ques. Who is the deputy sheriff?
Ans. J. L. Townsend.
Ques. Did he come while you were there at the place?
Ans. No sir.
Ques. When did you see him?
Ans. Well, I met him over at Camile Thomas' when we were returning with Blair.
Ques. After you had gone up to Blair?
Ans. Yes sir.

H. E. Townsend, called as a witness by the State, first duly sworn, testified as follows:

Ques. Your name is Homer E. Townsend?
Ans. Yes sir.
Ques. Where do you live?
Ans. At Spring.
Ques. What business are you engaged in?
Ans. I am postmaster at Spring and in the general merchandise business.
Ques. Did you know John Blair and Ben Shropshire in their life time?
Ans. Yes sir.
Ques. Do you know whether they are living or dead now?
Ans. Dead.
Ques. Did you see both of them after they were dead?
Ans. Yes sir.
Ques. How long have you lived at Spring?
Ans. Since 1880.
Ques. Are you or not familiar with the country lying North and northwesterly?
Ans. Yes sir, pretty well.

Ques. Are you familiar with the road that runs from Spring towards Wilburton?

Ans. Yes sir.

Ques. I believed I asked you about Blair and Shropshire being dead?

Ans. Yes sir.

Ques. How long had you known them?

Ans. Well, I don't know just exactly, but I have known Mr. Shropshire for about two years; Mr. Blair I have known for the last 6 or 7 years.

Ques. Do you know where they lived?

Ans. I don't know where Mr. Shropshire lived then; I know where Mr. Blair lived.

Ques. Where did he live?

Ans. He lived about a mile southeast of Wilburton.

Ques. And in the direction of Spring?

Ans. Yes sir.

Ques. From Wilburton?

Ans. Yes sir.

Ques. In other words, going from Spring, he lived about a mile southeast of Wilburton?

A. Yes sir.

140 Ques. Do you know the defendant, Marcellus Thomas?

Ans. Yes sir.

Ques. How long have you known him?

Ans. I reckon I have known him 8 or 9 years.

Ques. Do you know where he lives?

Ans. Yes sir.

Ques. How far does he live from the town of Spring?

Ans. Somet-ing about a mile.

Ques. In what direction?

Ans. A little west of north.

Ques. And with reference to the Wilburton road?

Ans. Well, he lives on a road, a traveled road through there, I think it is not a public road.

Ques. But it is a road?

Ans. Yes sir, and traveled more than the public road, it is about where the two roads come together, and, he lives to the right of the road.

Ques. Did you see Mr. Blair on the night of October, or evening of Oct. 9th, 1905?

Ans. Yes sir.

Ques. Where did you see him?

Ans. I saw him something like 75 or 100 yards from the place the shooting occurred, where he fell off his horse on to the ground.

Ques. Now, you spoke of the place where the shooting occurred; do you know about where the shooting occurred?

Ans. Yes sir, I suppose I do; I saw the tracks of horses there.

Ques. From evidences you found upon the ground?

Ans. Yes sir.

Ques. Now as to the point where you found those evidences on the

ground, was that north or south of the house of Marcellus Thomas?
Ans. North.
Ques. About what distance?
Ans. I should judge about 300 or 400 yards.
Ques. North of his house?
Ans. Yes sir.
Ques. Is there anything near the road at the point at which the shooting occurred?
Ans. Well, at the point the shooting occurred, right there are some trees—small trees.
Ques. At the point at which the shooting occurred on both sides of the road?
141 Ans. Well, the trees are on the left hand side of the road.
Ques. Going along the road to the north?
Ans. Yes sir, going north and on the right hand side going south.
Ques. That is, you say, at the point where the shooting took place, from the indications on the ground?
Ans. Yes sir.
Ques. Mr. Townsend, can you draw a diagram of the road leading out that way, showing the house of the defendant, the house of his brother Camile Thomas and the culvert on the road from the point at which the shooting occurred and going to the point at which Blair was found; the means by which, if any, the defendant could have left the road and gone to his house, and returned to the point where the shooting occurred?
Ans. Yes sir, I think I can.
Ques. Now, near what did you find Blair with reference to any improvements, did you find Blair near any place?
Ans. Yes sir.
Ques. What place?
Ans. It was called the Bruce place.

NOTE.—Witness here drew the diagram suggested by counsel for State.

Ques. Just show the road from Spring; it does not make any difference about the location of Spring, particularly?
Ans. This is the public road.
Ques. Now, show there at Bruce's field about where Blair was found; show where the woods are you spoke of?
Ans. There is a lane there outside of this road.
Ques. I want you to show what there is, a road or lane, that runs from any point around here, Mr. Townsend, up to where the shooting occurred, going up around to his house. What is that you are drawing there?
Ans. This is a lane.
Ques. Can you show the house of Camile Thomas?
Ans. Yes sir.
Ques. Where does John Brady live?
Ans. John Brady lives right over here. (Marking on diagram).
Ques. Now, where does Geo. Lindsley live? (Witness marks Lindsley house on diagram).

Ques. Now, Mr. Townsend, just resume your seat, and when I have interrogated you then you can point out the locations on the diagram to the jury. Now, you have drawn this diagram to
142 show the positions I have asked you about and the road?

Ans. Yes sir.

Ques. How close to or how near to Bruce's field did you find Mr. Blair?

Ans. Why, it must have been about 75 or 100 yards west of the road.

Ques. Was his horse there?

Ans. No sir.

Ques. Where did you first see Shropshire after the shooting?

Ans. I saw him just to the left of the road opposite Lindsley's.

Ques. Now, when you got to Shropshire's, who was there?

Ans. Why, Dr. Sellers, Camile Thomas, and I think Geo. Lindsley, I am not positive about Geo. Lindsley and his wife.

Ques. Is Geo. Lindsley a white man or negro?

Ans. He is a negro.

Ques. Where was Shropshire with reference to Lindsley's house?

Ans. Well, right due south of Lindsley's house on the side of the road.

Ques. Right or left hand side of the road?

Ans. On the left hand side going north.

Ques. When you got to that point was there anything to indicate where Blair was?

Ans. No sir, only he was hollering.

Ques. What attracted you to Blair?

Ans. The hollering.

Ques. What direction was he in from Shropshire?

Ans. Well he was a little north—a little west of north.

Ques. And how far from where Shropshire was?

Ans. Well, I suppose a half mile.

Ques. How close was Shropshire to the road?

Ans. He was right upon the side of the road.

Ques. Now, you have already stated that Blair was from 75 to 100 yards west of the road?

Ans. Yes sir.

Ques. Now, Mr. Townsend, will you come up here and point out to the jury those locations on the diagram?

NOTE.—Here occurred some examination and illustration before the jury not reportable.

Witness resumes the witness stand.

Ques. Now, Mr. Townsend, at the point—Did you go to the point down east from where you found Blair; did you go to where the shooting is said to have occurred?

Ans. Yes sir.

Ques. Now, at the point where it is said to have occurred, is there any bend in the road?

Ans. Yes sir, a slight bend.

Ques. Now, just to the right of that bend in the road what is there with reference to trees, were there trees there?

143 Ans. Yes sir, at the point where the shooting is said to have occurred there is a grove of pine and post oak trees, few on left side going north, on right side there is quite a lot.

Ques. Now did you see or examine for any horse tracks at about that point to the right of the road?

Ans. Yes sir.

Ques. Did you find any?

Ans. Yes sir, we found horse tracks.

Ques. Where were they with reference to the edge of the road?

Ans. Why, they were to the right of the road.

Ques. About what direction from where you found any signs of the shooting that occurred or of persons being there who were shot?

Ans. Well, it was north of the corner there.

Ques. Did you find any sign in the road there?

Ans. Yes sir.

Ques. What was it?

Ans. Why, on the left hand side of the road we found where one horse went up the road, where he wheeled and dug his hoof in the sand and made a track across the wagon road.

Ques. You could tell he wheeled, and went in what direction?

Ans. Well, the horse wheeled around; but outside of the road there was grass and leaves and weeds and we could not track it any farther.

Ques. Well, did it wheel around to the west or east?

Ans. It wheeled to the west.

Ques. In what direction with reference to the direction in which you found Blair?

Ans. Well, it was in the direction in which we found Blair.

Ques. Was that a large or small horse's track?

Ans. A large horse's track.

Ques. Do you remember whether Blair was riding a large or small horse?

Ans. He was riding a large horse.

Ques. What kind of a horse was Shropshire riding?

Ans. He was riding a small animal.

Ques. Could you tell from the tracks which was riding to the left or right as they traveled along there?

Ans. Yes sir, the small horse was to the right.

Ques. Then the small horse was nearest to the right of the road where you found these horse tracks about those trees?

Ans. Yes sir.

Ques. Was there more than one track at the point where you saw the horse tracks

Ans. We only found one horse's track.

144 Ques. I mean did the horse make more than one track?

Ans. Yes sir, there were several tracks, some over to one side.

Ques. Any indication that he stood there for at least some time?

(Objected to by defendant's counsel as an assumption).

Ques. I ask you if there was any indication that he had stood there for some time?

Ans. It indicated either that he stood there for some time, or, possibly when he shot, the horse jumped.

Ques. There was more than one track right at that point?

Ans. Yes sir.

Ques. Now Mr. Townsend, coming back to the signs in the road, did you see any sign, any other sign than those you have mentioned with reference to a man falling off a horse?

Ans. Well, at the point where the horse wheeled, right in the middle of the road, we found some little signs that looked like a man might have made the print of his knee in the ground, and then we found a man's track.

Ques. Did you find any blood signs there?

Ans. Yes sir.

Ques. Well, where with reference to the impression, the knee impression in the ground, did you find the first blood sign?

Ans. Right at that point.

Ques. Now, take that as the pivotal point, what direction, and about what distance was that from where this horse tracks were to the right of the road?

Ans. Well, I would judge—I never measured it—but about 12 feet.

Ques. At the point at which these horse tracks were in the road, at the right of the road, is there any trees between that point, and the point where you found the knee impression and blood sign in the road?

Ans. How is that?

Ques. Is there any trees between where you found the knee print and blood sign in the road, and the point where you found these horse tracks up to the right?

Ans. No sir, no trees, but there was a tree at the point where the shooting is said to have occurred, opposite to where the horse wheeled, there is a pin oak tree there with limbs extending out.

Ques. Do they grow low or high?

Ans. They are very low, a man could not ride under them on horseback.

145 Ques. Now, a man riding along there, even in daylight, a man riding along there, would or not that tree at that point where the horse tracks were to the right of the road, afford some obstruction to the view from the road?

Ans. Well, it would have afforded some obstruction.

Ques. Before these men could have gotten up there, a man could have reached it without being seen?

Ans. Yes sir.

Ques. Now, did you notice the character of tracks made in the road by the two horses, the big horse and the little horse?

Ans. Well, yes, I judge they were in a walk.

Ques. From the impressions made in the ground?

Ans. Yes sir.

Ques. When a horse trots or goes out of a walk, does it or not, make a deeper impression?

Ans. Yes sir.

Ques. Sometimes a kind of sliding impression, after a rain?

Ans. Yes sir.

Ques. These tracks, were they that kind of impression?

Ans. No sir.

Ques. Now, getting back to the foot tracks, you say you saw a man's track there, what direction did they go?

Ans. He walked back towards Spring, south.

Ques. Did you follow them to see whether there were any blood signs?

Ans. Yes sir, we followed it and found blood all along the track.

Ques. How far did that track go, where did it stop?

Ans. Why, I never measured it, but I judge he walked about 60 yards.

Ques. Then what did you find there?

Ans. We found where he had either sat down or laid down.

Ques. At that point?

Ans. Yes sir.

Ques. Then did you find any more tracks from that point farther south?

Ans. No sir, not at that point. The road had been traveled up to that point and we never tried to track it any farther.

Ques. You could not tell the track any farther?

Ans. No sir.

Ques. Now, with refrence to blood, did you find any blood between that point and where you found Shropshire?

Ans. No sir, we never looked for any, the road had been traveled.

Ques. Well, now, do you know, Mr. Townsend, do you know about how far Shropshire was when you found him—when you got to him—about how far he was from the point where this shooting is said to have occurred—I mean towards Spring?

Ans. About half a mile, I judge.

146 Ques. Where was his horse?

Ans. When I was coming down the road, I was riding a bicycle, and I met Ed Rolland riding Mr. Shropshire's horse. Ed told me that he was going for a doctor. I told him the doctor had been notified, and for him to go for the deputy sheriff, and he told me that the deputy sheriff had already been notified, and we turned around and came back.

Ques. Well, at any rate you found Mr. Shropshire's horse in the possession of Ed Rolland.

—. ——.

Ques. Ed Rolland is a darkey, is he?

Ans. Yes, sir, he is a darkey.

Ques. He is a darkey who lived in that neighborhood?

Ans. Yes sir.

Ques. Do you know what became of Mr. Blair's horse, was there any signs of what had become of it?

Ans. Yes sir, we found it north of where this shooting is said to

have occurred. We found the horse when we were going out from where we found Mr. Blair lying. We found also where the horse had dragged the bridle reins across the road, and went on down in that direction.

Ques. You could tell by his tracks?

Ans. Yes sir, and by its dragging the bridle reins.

Ques. Now, getting back to the tracks just beyond and behind that tree from the point of the shooting, can you describe any peculiarity about those tracks, if there was any?

Ans. How is that?

Ques. The tracks to the right of the road and beyond the tree?

Ans. Well, it was a smaller horse than the horse Mr. Blair was riding; it made a smaller track, and it looked like it had been split or a piece chipped out of the hoof.

Ques. There was a notch in the hoof?

Ans. Yes sir.

Ques. Was that a front or hind foot?

Ans. It was a front foot made the impression.

Ques. Did you notice any peculiar tracks made by the hind feet?

Ans. Well, I never noticed anything more than the chip out of the hoof.

Ques. Could you tell which front foot it was?

Ans. No sir .

Ques. Did you go with the parties to look for the man who was supposed to have done the shooting?

Ans. Yes sir, I went that night, to Marcellus Thomas' residence.

Ques. Did you find him there?

Ans. No sir.

147 Ques. Who, if any one, did you find there?

Ans. We didn't find any one there.

Ques. No one at all, do you know his wife?

Ans. Yes sir.

Ques. Was she present?

Ans. No sir.

Ques. What was the condition of the house?

Ans. Well, we halloed, and could not get any response.

Ques. Was the house open or closed?

Ans. Closed.

Ques. You halloed, was there any light in the house?

Ans. No sir.

Ques. About what hour, what time was that?

Ans. Well, I don't know exactly the time, I suppose it was something like 11 o'clock.

Ques. You went to his house?

Ans. Yes sir.

Ques. About what time did the shooting occur?

Ans. Well, I don't know exactly, but when I found it out, it was about 8 o'clock or probaly a little after.

Ques. Probably a little after 8, had you seen Mr. Shropshire and Mr. Blair in town that day?

Ans. Yes sir.

Ques. Did you see them when they started home?
Ans. No sir.
Ques. Now, the point at which you have described the shooting to have occurred, was that or not on the way they had to travel to go towards their homes?
Ans. Yes sir.
Ques. Did you go down to where the defendant was arrested?
Ans. Yes sir.
Ques. Have you since seen the horse that made that notched track?
Ans. Yes sir, I have seen it.
Ques. Have you seen the hoof?
Ans. No sir, I have not seen the hoof.
Ques. Whose horse was it?
Ans. I was told it belongs to——

(Obj.)

Ques. Why didn't you notice the notch in the hoof?

(Objected to.)

Ques. How do you know it was the same horse?
Ans. I was told that was the horse——

(Answer stricken out.)

Ques. Mr. Townsend, did you assist in getting the parties to Spring—Blair and Shropshire to Spring?
Ans. No sir, I left to telegraph to Conroe for the dogs.
Ques. That killing occurred near the Montgomery county line?
Ans. Yes sir.
Ques. Do you know whether Wilburton is in Montgomery or Harris county?
Ans. Yes sir, it is in Montgomery county.
Ques. The home of Blair then, was in Montgomery county?
Ans. Yes sir.
148 Ques. Did you see anything of Marcellus Thomas anywhere around there?
Ans. I don't remember seeing him.
Ques. Well, did you see him or not?
Ans. I did not.
Ques. I mean after the shooting?
Ans. No sir.
Ques. Do you know what county the place where the shooting occurred was in?
Ans. Yes sir, in Harris county.
Ques. State of Texas?
Ans. Yes sir.
Ques. Did you see which direction the tracks were to the right of the road, a little distance you say, about 12 or 15 feet northwardly from the point where you found knee prints in the road. Did you see what direction they came from?
Ans. Well, the tracks, where the horse was standing: That is, he

wheeled to the south, and outside of the road after we got 4 or 5 feet from the road there was grass, and the ground was hard.

Ques. That was in the direction of the defendant's house?

Ans. No sir, that was east of the road; out in that grass the ground was hard.

Ques. You didn't find any tracks there?

Ans. Yes sir, we found tracks, several tracks back, before the horse stepped on the grassy road.

Ques. With reference to the notched track, did you find that same track there?

Ans. Yes sir.

Ques. Coming from what direction?

Ans. Well, it broke in from the east.

Ques. From an easterly direction?

Ans. Yes sir.

Ques. Now, did you look, examine his house, go into his house and search?

Ans. Yes sir, I was standing outside with my father, after finding nobody there——

Ques. Your father is deputy sheriff?

Ans. Yes sir, after finding nobody there we went up to his brother's house, and afterwards came down again with a lamp——

(Objected to by defendant's counsel as immaterial.)

Mr. BROCKMAN: We want to know if there were any arms about the place.

Mr. ALLEN: I object to it because it is no part of the *res gestæ*.

WITNESS: Then after that we went in the house with the light. My father stood at the door, and we went in and went through the house, and when we came out my father said——

Mr. BROCKMAN: Don't tell what he said, the defendant wasn't there?

WITNESS: No sir.

149 Mr. BROCKMAN: It wouldn't be proper to state anything he said.

Ques. Mr. Townsend, was Mr. Blair able to get up when you got to him?

Ans. No sir.

Ques. Did you find any weapons about him?

Ans. No sir.

Ques. Did you see the way he was dressed?

Ans. Yes sir.

Ques. Was he examined for any weapons?

Ans. Yes sir.

Ques. Did he have any, as far as you know?

Ans. No sir, not any that I saw.

Ques. Well, did you find any about Shropshire?

Ans. Well, I helped take some of his clothes off, his jumper and shirt, and I didn't find any weapons—that is on Blair.

Ques. With reference to Shropshire, did you find any about him?

Ans. Well, we didn't find any on him either.

Ques. Where is Westfield from the point where the shooting occurred?

Ans. South about five and one-half or six miles.

Ques. You stated you were not present when the defendant was arrested?

Ans. No sir.

Ques. Well, how long did it take you to go out there?

Ans. Well, I don't suppose it took more than 10 minutes or so.

Ques. What was Shropshire's condition, was he able to travel?

Ans. I don't know that he was; he was lying down upon the ground.

Cross-examination:

Ques. You say you helped to take the clothes off from Blair and found no weapons?

Ans. Yes sir.

Ques. Had any one been to him before you got there?

Ans. Well, when I got to Mr. Blair he was lying down, there were no other persons there then.

Ques. How far was Blair when you found him from where the indications are that the shooting occurred?

Ans. From 75 to 100 yards, I judge.

Ques. How far was that from the north end of the lane north of defendant's house?

Ans. How far?

Ques. Yes sir?

Ans. I don't know how far.

Ques. I mean from the north end of that lane?

Ans. Well, I judge about 300 yards.

Ques. 300 yards north of the north end of the land?

Ans. Yes sir.

Ques. How long is that lane?

Ans. Well, something like 75 yards.

Ques. Is it not 180 yards long?

Ans. I never measured it.

Ques. That is your best judgment?

Ans. Yes sir, my best judgment.

Ques. Well, how far was the place indicated as where the shooting occurred from the north end of that lane?

Ans. Well, from where the shooting occurred I said 75 or 100 yards.

Ques. Then the shooting occurred, as you understand it, from the indications, about 300 yards north of the north end of the lane?

Ans. Yes sir.

Ques. And about 75 or 100 yards northwest from where Blair was found?

Ans. Yes sir.

Ques. Did he live in sight of the road going north?

Ans. Yes sir.

Ques. Where with reference to these tracks you say you saw that had this peculiar mark, how far back up the road did you follow those tracks?

Ans. Going north—we followed them into the public road.

Ques. Running to Houston?

Ans. We followed out to the public road.

Ques. Now that was going north or coming from the north?

Ans. Going north.

Ques. Did you notice any tracks coming from the north or from the east of the road—this same peculiar mark, coming from the north? Coming from the north or northeast?

Ans. No sir, not in this road.

Ques. Did you anywhere?

Ans. Coming to the road, we found them right in the road.

Ques. How far north of this clump of trees?

Ans. We found them at several places where the horse made tracks into the grass.

Ques. Now, do you mean by that you found those tracks going to the right several steps back of the tree?

Ans. Well, we were going north.

Ques. (Tracks) Bearing southward?

Ans. Yes sir, bearing southward.

Ques. How far was this pin oak tree you spoke of as affording some obstruction as approaching from the south, from the side of the road?

Ans. Well, I would judge it was about 3 feet.

Ques. Three feet from the side of the road?

Ans. Yes sir.

151 Ques. Where was that tree with reference to where you saw these tracks in the road—this marked track you say you saw there?

Ans. The man's track?

Ques. No sir; this peculiar hoff or horse track?

Ans. Well, it was probably about 12 feet the other side of the tree.

Ques. The other side of the tree?

Ans. Yes sir, north of it.

Ques. How far from the tree were the tracks you saw just prior to where the horse turned as if to go north; or, rather, how far from this tree where this peculiar track you saw last approaching south before the horse turned as if to go north?

Ans. The horse tracks, you mean.

Ques. Yes sir; approaching the tree, going south?

Ans. I suppose 20 feet.

Ques. Twenty feet from the tree?

Ans. Yes sir.

Ques. How far were the tracks south of the tree where the indications were the large horse had turned in the road?

Ans. How far south of the tree? It was just opposite the tree.

Ques. And in the road, in the middle of the road, or on the west side of the road?

Ans. In the road.

Ques. How far from the tree were the imprints of the knee you spoke of?

Ans. Well, I judge about three feet.

Ques. Right up under the tree practically?
Ans. No sir, not under the tree.
Ques. The road runs right up by the side of the tree?
Ans. Yes sir.
Ques. How far west of the tree were the peculiar tracks you saw by the side of the road, that peculiar hoof you saw?
Ans. I didn't find any there.
Ques. I don't mean west of the road, I mean west of the tree.
Ans. I didn't find any west of the tree.
Ques. You say they were up 20 feet from the tree north?
Ans. Yes sir, north going south.
Ques. How close together, from the indications, and everything you observed were the horses when the horse turned in the road, the big horse, how far was the third horse from where the big horse turned?
Ans. The two horses were not running, they were walking both in the road, and the third horse was about 12 feet the other side of the road, and the near horse was about three feet on the right of the road.
152 Ques. How close to those tracks of the horse that wheeled did this peculiar track come?
Ans. Well, they came right up against it.
Ques. Right near together?
Ans. Yes sir.
Ques. From the indications of both tracks, how near was the man on the horse on the right side of the road, that is going north, was he to the horse going south, or the one that had the peculiar hoof?
Ans. Well, I would judge about a foot and a half.
Ques. Very close together?
Ans. Yes sir.
Ques. How far does Camille Thomas live from the defendant Marcellus Thomas?
Ans. I should judge about 100 yards.
Ques. You say it is about 100 yards north and a little east?
Ans. Yes sir, a little south.
Ques. You say that Camille- House is on the road that leads around to what is called Wilburton?
Ans. Yes sir, on the left hand side of the road.
Ques. How far from Camile's house is it to that little road you have indicated on the map as turning off to the right to Marcellus' house?
Ans. Well I would judge about 80 yards.
Ques. How far is it from Camile's house around to where the road comes back practically north of Marcellus' house?
Ans. How is that?
Ques. How far is it from Camile's house, I mean around in this direction, until you get practically north or opposite Marcellus' house?
Ans. (Pointing on Diagram:) Here is Camile's house.
Ques. How far is it from there to this point just north of Marcellus' House?
Ans. To this point here?

Ques. Yes sir?

Ans. Well, I would judge—right back of the field—I would judge from 175 to 200 yards.

Ques. How far is it from that point up to where the shooting occurred?

Ans. Well, I judge about 150 yards.

Ques. Not more than that?

Ans. No sir.

Ques. How far is Marcellus' house from this road that leads *passed* Camile's house?

Ans. This is the main one leading around here.

153 Ques. How far is it from Marcellus' house up here?

Ans. Well, it is right on the side of the road; the road goes around to the house.

Ques. How far away?

Ans. Well, I never measured how close it is.

Ques. 50 yards or 75 yards?

Ans. Well, I believe it is about 25 yards.

Ques. 25 yards?

Ans. Yes sir, I guess it is 25 yards from his house to the road right at this point.

Ques. Now, how far is it from Lindsley- house up to where Camile Thomas lives?

Ans. About 300 yards.

Ques. Do you know where Elijah Robbins lives?

Ans. Yes sir.

Ques. Where did he live at that time with reference to Lindsley's?

Ans. He lived in Montgomery county across from Spring.

Ques. Don't Elijah Robbins live between Lindsley and Spring?

Ans. Not exactly.

Ques. Was he working up there at the time?

Ans. He worked at Westfield.

Ques. Was he up there upon this road somewhere?

Ans. Yes sir, up there north.

Ques. Where is the store with reference to this road?

Ans. I never was on the road right up by the store.

Ques. It is on the road leading out to what is called the Wilburton road or practically upon it.

Ans. Well, right about there on the road.

Ques. How far is it from Lindsley- house out here to Brady's house?

Ans. Well, I would judge about 300 yards.

Ques. Where does the road leading to Brady's house leave this road with reference to Lindsley'- house, south or practically in front of it?

Ans. Well, south of it.

Ques. You say you first saw Mr. Shropshire when you got to a place near to the Lindsley house?

Ans. Yes sir.

Ques. Whom did you say was there at the time?

Ans. Dr. Sellers was there for one; don't know whether Geo. Lindsley was there or not.

Ques. Was Lindsley's wife there?
Ans. Yes sir, and I think some other colored women there, I never noticed who they were.

154 Further direct examination:

Ques. With reference to the road leading to Brady's, you say that he lives on the Wilburton road south of Lindsley?
Ans. Yes sir.
Ques. This man Elijah Robbins, you say you know no such man in that neighborhood?
Ans. Well, yes.
Ques. I say living in that same vicinity?
Ans. No sir.
Ques. You are the postmaster up there?
Ans. Yes sir.
Ques. You say you know an Elijah Robbins living over in Montgomery county, working at that time in Westfield?
Ans. Yes sir.
Ques. Where is Westfield?
Ans. That is 4½ miles south.
Ques. On what road?
Ans. On the I. & G. N. R. R.
Ques. Spring is also on the I. & G. N. R. R.
Ans. Yes sir.

Further cross-examination:

Ques. In answer to a question about finding any arms, you said you did not find any on Shropshire; do you know of anybody else finding any?
Ans. No sir.
Ques. Did you see him searched?
Ans. Yes sir.
Ques. You didn't see any?
Ans. I didn't see any arms at all on Shropshire.

Dr. J. C. SELLERS, recalled by State, testified as follows:

Ques. From the examination of the wounds on the bodies of the deceased Blair and Shropshire, state whether or not the wounds came from the right or left, and if they came from the right or left, whether from the front or rear?
Ans. They came from the right, not exactly in a straight line, of course, because the shot went in at a little bit of an angle.
Ques. The shot went in as if they came from the front and right?
Ans. Yes sir.
Ques. Did they come from the front and right?
Ans. Yes sir.

J. F. HARGRAVES, called as a witness by the State, first duly sworn, testified as follows:

Ques. Where do you live, Mr. Hargraves?

Ans. I live in Montgomery county.

155 Ques. Are you acquainted with the road that leads out from Spring station what is called the Wilburton road leading out to Wilburton?

Ans. Yes sir, I am.

Ques. Do you know the location where Shropshire and Blair are said to have been shot?

Ans. Yes sir.

Ques. Where did you first see Blair and Shropshire, after being shot?

Ans. They were brought to Dr. Seller's drug store at Spring.

Ques. Who did you go with to Spring?

Ans. Sheriff Anderson of Montgomery county?

Ques. Are you one of his deputies?

Ans. Yes sir.

Ques. What time did you arrive at Spring, and how did you go?

Ans. Well, sir, we went on the evening train; I think it was late, it should have got to Conroe at 5:03. It was sometime after that, I don't — the exact time we got there.

Ques. But not late in the night?

Ans. No sir, the early part of the night.

Ques. When you got there *waht* did you all do with reference to going out to where the shooting is said to have occurred?

Ans. Well, sheriff Anderson and I, and Mr. Townsend, a deputy, we went out to where the shooting had occurred and we examined the ground.

Ques. Did you know Mr. John Blair and Ben Shropshire?

Ans. Yes sir.

Ques. They lived in your county, did they?

Ans. Yes sir.

Ques. Where did Shropshire live with reference to where Blair lived?

Ans. Well, he lived—I don't know exactly, but he lived right there close to Wilburton.

Ques. About how far did they live from the place where the shooting occurred?

Ans. Well, I suppose some 3 or 4 miles.

Ques. Well, do you know what kind of a horse Blair was riding?

Ans. No sir.

Ques. Did you see Shropshire's horse?

Ans. No sir.

Ques. You say you started out to the scene of the killing?

Ans. Yes sir.

Ques. What did you all do first?

Ans. Well, the first thing we did was we went to this negro's house to see if there was anybody there.

Ques. Did you find anyone there?

Ans. No sir.

Ques. Then what did you next do?

Ans. Well, the next thing we did we went back 100 or 200
156 yards to where his brother lived and got him.

Ques. Is that the one called Camile?

Ans. I think so.

Ques. The one who lives down the road towards Spring?

Ans. Yes sir.

Ques. On the left hand side of the road as you go south?

Ans. Yes sir, we got him and went back.

(Counsel for the defendant objected to this testimony because it was several hours after the occurrence.)

The COURT: Witness can just tell what he did.

Ques. Go ahead?

Ans. After we got his brother, we went back to his house and struck a light and went up to the place where the shooting took place.

Ques. Now, when you got to that point, where the shooting had occurred, what did you find?

Ans. Well, we first found where Mr. Blair had been shot.

Ques. Now, at that time both men were in Spring?

Ans. Yes sir.

Ques. Were they there when you came in?

Ans. Yes sir.

Ques. Well, now, did you find any horse tracks going towards where you found Blair or coming away, when you got there?

Ans. Yes sir, we found where Blair had fallen off his horse, where the horse had wheeled away in the road; then on the right of the road about 12 feet we found another horse track, a small horse's track standing, or it seemed to be standing.

Ques. Well, in what direction from the place where you saw the signs where this horse dug his foot into the ground?

Ans. It was north.

Ques. Now, how far, about how far from the edge of the road?

Ans. About 12 feet.

Ques. You mean to say it was north; then about how far out of the road?

Ans. I say about 12 feet.

Ques. It was out to the right of the road?

Ans. Yes sir, out to the right of the road?

Ques. Did you notice anything peculiar about that track?

Ans. Well, this horse's track the horse that stood on the right of the road—I think it was his right hind foot, was kind of slipped off on one side and one of his fore feet had a gap or notch in his hoof.

157 Ques. Well that place in his hind foot would that make any impression as to show in his track?

Ans. Yes sir, it showed plain in his track.

Ques. This notch in the front foot, that also showed?

Ans. Yes sir.

Ques. Now, with reference to those two distinguishing characteristics did you see that track you found up there at the right of the road?

Ans. Yes sir, I also saw the same track on above there a piece, which would be north; well——

Ques. Along the road?

Ans. Yes sir along the road, where he came into the road and traveled north, and then quit the road.

Ques. That is the same road that leads up to Wilburton, he went that direction for some distance?

Ans. Yes sir.

Ques. And then turned out?

Ans. Yes sir.

Ques. Did you notice any sign about where those horse tracks were of any one having fallen on the ground?

Ans. Yes sir, where a man had fallen.

Ques. You could tell it by what?

Ans. Well, blood was there, and where he had got up and walked.

Ques. Did you see any sign in the dirt of any print where he had fallen?

Ans. Yes sir.

Ques. Any blood there?

Ans. Yes sir.

Ques. How far did you notice the blood down the road?

Ans. Myself, only right where he had fallen.

Ques. That was right where the horse tracks were?

Ans. Yes sir.

Ques. That track that lead off from there, do you know whose track that was?

Ans. Why, no, I don't.

Ques. Whose track was it like, do you know?

Ans. Well, it corresponded with Shropshire's track.

Ques. You were quite well acquainted with Shropshire?

Ans. Yes sir.

Ques. Did you go down to where the defendant was arrested?

Ans. Yes sir.

Ques. Did you see that notched track of the front foot or the hind foot anywhere up there?

Ans. Yes sir, we found it along under a cypress tree between Spring and that branch along where there had been a dump thrown up. Mr. J. L. Townsend and I were riding along, the balance of the crowd had gone on and we got out and examined that place in the road as we went that way where we thought it very
158 natural we would find the same tracks, and we found just such tracks again.

Ques. Now, without saying what had been told you: Had you all gained any information that lead you in that direction; don't say what it was; did you have any?

Ans. Yes sir, we had information.

Ques. You found a track then to correspond?

Ans. Yes sir.

Ques. Was you present when the defendant was arrested?

Ans. Yes sir.

Ques. Where was he arrested?

Ans. At the section house at Westfield.

Ques. Was there any horse about there?
Ans. Yes sir.
Ques. Do you know what became of the horse?
Ans. Well, he had him there.
Ques. Who had him there?
Ans. Marcellus Thomas.
Ques. Did you have him saddle him up?
Ans. Yes sir, and ride him off.
Ques. With reference to the track you saw up at the right of the road 12 feet from where these men were shot, how did the track of that horse correspond with this horse's track?
Ans. Well, the track corresponded.
Ques. Was the defendant there when you all got there?
Ans. Well, yes, he was in the section house.
Ques. Did you go in?
Ans. No sir, I didn't go in Mr. Camile Thomas was at the door and Mr. Townsend went in.
Ques. Of course you don't know what was done in there?
Ans. No sir, I don't know.
Ques. Did he have anything in the way of weapons?
Ans. Yes sir, a shot gun.
Ques. A double-barrel shot-gun?
Ans. Yes sir, a double-barrel shot-gun.
Ques. Did you examine it to see whether or not it was empty?
Ans. No sir, I didn't.
Ques. You state that the horse that the defendant rode away from the section house where you all arrested him, made the same track that you saw up there by the side of the road, or at the right of the road?
Ans. Yes sir, the same track.
Ques. You saw other tracks you say, and saw the track of the horse that the defendant was on, and observed it?
Ans. Yes sir.
159 Ques. And it was the same track?
Ans. Yes sir.
Ques. Do you know what kind of a horse Shropshire was riding?
Ans. No sir, I don't.
Ques. Along near the place where this horse wheeled, could you tell any difference in the size of the two horse's hoof-, the size of Blair's horse's hoof and Shropshire'- horse's hoof.
Ans. Yes sir, the horse on the left made considerably the largest track.
Ques. The horse on the left; that is the horse that wheeled?
Ans. Yes sir.
Ques. You say it must have been one hundred to one hundred and fifty yards from where the horse wheeled to where Blair fell?
Ans. Yes sir.
Ques. What did you find there?
Ans. Well, we found blood and boots and boxes scattered along.
Ques. Well, did you track the horse from there anywhere?
Ans. Well, no sir, we could not track it because there was grass there. I found one of the boots lost off the saddle, I suppose it was

30 yards southeast from where he was lying, and south of where the horse had wheeled in the road in the road; I just supposed it was Blair's horse, it went in that direction.

Ques. Did you go and look up in the road and examine there to see which way the horse went with the bridle reins hanging?

Ans. No sir, I didn't go that far.

Cross-examination:

Ques. You found that about where you found the horse in the road as you were going out?

Ans. No sir, we found the boot afterwards.

Ques. Was it along the road?

Ans. No sir, it was on the road, about I suppose 100 yards, either in the prairie or in the road, I don't know which it was.

Ques. Were there any fences along the road near there south of where the horse wheeled in the road?

Ans. South? Well, there is a little patch of ground where a gentleman lives; his fence is on the road.

Ques. How far north of that fence, the north line of that fence to where the horse wheeled in the road?

160 Ans. Well, 150 to 200 yards, it was night, I could not tell exactly.

Ques. Was the moon shining brightly that night?

Ans. Yes sir, the moon was shining.

Ques. Had it been raining, or was it dry weather?

Ans. Well, I think it was dry weather.

Ques. What kind of soil is that along there?

Ans. Why, sandy soil.

Ques. Well, was the ground outside of the road covered with grass and weeds or anything of that sort?

Ans. No sir.

Ques. At this point where you say you found the horse track in the middle of the road where they turned, how far was it from where they turned to where you first discovered the print of this big hoof you spoke of.

Ans. From where the horse wheeled?

Ques. Yes sir?

Ans. Why, about 30 feet.

Ques. Well, from where the horse wheeled, did you discover whether that track was going north or south—this big track?

Ans. When we first found that track, and found it left there, it went north.

Ques. Where was that place with reference to where the horse wheeled?

Ans. It was 12 feet from the right of the road, or somewhere in that neighborhood.

Ques. The ground was covered out there with grass and weeds, wasn't it?

Ans. Well, it is sandy; the road is tolerable well traveled.

Ques. How far was that from that clump of trees along there?

Ans. Well, it was right in a clump of those trees.

Ques. How far were the trees from the side of the road?

Ans. Well, they were right along the road. As well as I remember now, the road looked like it had been a narrow road through the timber.

Ques. Did you see any signs of the horse with the big hoof at any distance from the road, from the place where you were standing, approaching to where either horse turned into the road?

Ans. No sir.

Ques. Did you see any tracks between that place and the road?

Ans. No sir.

Ques. Did you see any in the road at all?

Ans. No sir.

Ques. No sign of any big foot there?

Ans. The horse jumped in the road just beyond where the shooting was. I don't remember the distance exactly where it
161 struck the road, but a very short distance until it struck the road going north.

Ques. Did you see the track of the split hoof and the tracks of the other horses near together in the road?

Ans. No sir.

Ques. How near was the closest point where those two tracks came together, that is, the horse with split hoof and the other two horses.

Ans. Not less than 12 feet.

Ques. Where and from what point did that horse turn to go north—the horse with the big hoof?

Ans. Well, it turned north, and went right up north just a little piece. I could not say the distance, but a very short distance, and struck the road, and went right on up the road. I did not go very far with the sheriff and Mr. Montgomery I went only a short distance, they went on.

Ques. How far did you trace that horse with the split hoof before it left the road?

Ans. Well Mr. Montgomery and I we went only some 30 or 40 steps, or something like that, they went on ever so far; they were gone I don't know how long.

Ques. Where were the tracks that indicated the horse was standing with reference to where the horse turned in the road; was it north, south east or west?

Ans. Why, it was north.

Ques. How much, how far north from where they turned.

Ans. Well, about 12 feet.

Ques. 12 feet north of where they turned?

Ans. Well, you might call it a little northeast, but the road runs north, and the horse appeared to be about 12 feet to the right of where the other two were.

Ques. 12 feet of the road and a little north of the road?

Ans. Yes sir, a little north of the road.

Ques. Was there any tracks indicating that horse had gone from that point out to where they were that you could see?

Ans. No sir.

Ques. Could you see any prints of that split hoof on the edge of the road immediately in front of where those horses were?

Ans. No sir.

Ques. Was Mr. Homer Townsend with you at that time?
Ans. No sir.
162 Ques. You didn't see any tracks along the road, along the edge of the road made with this split hoof?
Ans. No sir.
Ques. About how far north of the defendant's house was this point where this horse is supposed to have turned into the road?
Ans. Well, I suppose about somewhere 150 to 200 yards, don't know the exact distance, it was night.
Ques. You think about 150 yards north of the fence?
Ans. I don't know about north of the fence; I don't remember how large a patch it was.
Ques. Well, where did you first discover the foot prints of what you thought was Mr. Shropshire's horse?
Ans. Right where we found—where Mr. Shropshire had fallen in the road.
Ques. What evidence was there of his having fallen in the road; what did you see to indicate that he had fallen in the road?
Ans. Well, I seen a print or track where he fell in the sand.
Ques. What kind of a print—foot print?
Ans. No sir, I can't say what kind of print, but the blood showed where he had fell?
Ques. You saw the blood upon the ground; that was the main thing, was it not?
Ans. That was the main thing. This foot print showed that he got up in that very spot.
Ques. You are sure that was Mr. Shropshire's track, are you?
Ans. No, I am not sure that was Mr. Shropshire's track.
Ques. You never measured it; you are drawing conclusions here, because you supposed that was where he had fallen?
Ans. Yes sir.
Ques. That is the way you fixed it?
Ans. Well, it corresponded with his track.
Ques. When did you measure his track?
Ans. Well, later that night and I have seen it since that time, and this showed the same size track.

Further direct examination:

Ques. With reference to that track; you say the notch foot track came into the road somewhere opposite to where the tracks were out in the road?
Ans. Yes sir.
Ques. Then it went north in that road?
Ans. Yes sir.
163 Ques. Could you say from the character of that track, the indentation in the sand, whether that horse was going fast or slow?
Ans. Yes sir, it was going fast.

WALTER MONTGOMERY, called as a witness by the State, first duly sworn, testified as follows:

Ques. Your name is Walter Montgomery?
Ans. Yes sir.
Ques. Where do you live Mr. Montgomery?
Ans. At Conroe.
Ques. What is your business?
Ans. I am a railroad man.
Ques. You sometimes act as deputy sheriff?
Ans. Yes sir, I have on a few occasions.
Ques. On special occasions?
Ans. Yes sir.
Ques. Did you know John Blair and Ben Shropshire in their life time?
Ans. Yes sir.
Ques. Mr. Montgomery where were you at the time they were said to have been shot?
Ans. I was at Conroe.
Ques. Did you see them any time that night after they were shot?
Ans. Yes sir.
Ques. What time?
Ans. Why, sometime between 12 and 1 o'clock.
Ques. Who did you go down there with and how did you go?
Ans. I went down with Mr. Sheriff Anderson.
Ques. You went with sheriff M. A. Anderson?
Ans. Yes sir.
Ques. And who else?
Ans. Mr. Hargraves.
Ques. The gentleman just upon the stand?
Ans. I didn't know he had been in.
Ques. I thought you met him as you came in?
—. No sir I didn't.
Ques. Now, how did you go; did you go down on the train?
Ans. Yes sir we went down on the train.
Ques. Had the sheriff M. A. Anderson made any arrangements for horses at Spring in order to go?
Ans. Yes sir Mr. Townsend had the horses there.
Ques. He is a deputy sheriff at Spring?
Ans. Yes sir.
Ques. When you arrived did you go to where Shropshire and Blair were?
Ans. Yes sir.
Ques. Where did you find them?
164 Ans. We found them lying on a mattress in a little office—Dr. Sellers' office.
Ques. What was the condition of Blair at the time?
Ans. Well, Blair was lying there, and when I walked in he had his eyes shut, I spoke to him and he recognized me and spoke to me.
Ques. He seemed to be conscious did he?

Ans. Yes sir.

Ques. Conscious and rational?

Ans. Yes sir.

Ques. Did you speak to Mr. Shropshire at the time?

Ans. Why, when I spoke to Mr. Blair Mr. Shropshire opened his eyes and spoke to me also; they were both lying then on the same mattress.

Ques. After seeing the wounded men, did you go out to where the shooting is said to have occurred?

Ans. Yes sir.

Ques. What did you find out there, what was the first thing you did out in that direction?

Ans. Why, the first thing was to go down to that negro's house and search his house.

Ques. Who all were with you?

Ans. Mr. H. E. Townsend, deputy sheriff Townsend, Mr. Tom Webb and Mr. Hargraves.

Ques. Mr. Montgomery, without telling what Mr. Shropshire said, did anything that he said give you all an idea who did the shooting? (Don't say what he said) but from what he said?

Ans. Yes sir.

Ques. Was it by reason of that you went to the defendant's house?

Ans. Yes sir.

Ques. Did you find anything or anybody there?

Ans. No sir.

Ques. Now Mr. Montgomery after leaving the defendant's house, where did you then go?

Ans. We went out to search the place where the shooting had occurred.

Ques. Did you find any evidence where anybody is said to have fallen or any sign of anybody having been hurt?

Ans. We first went to the place where Mr. Townsend said they had taken Mr. Blair off the ground, and found where he had laid or rolled on the grass and vomited blood; then we looked up the horse tracks and from this track we came along back to the road down to where the shooting is said to have occurred.

Ques. What was the size of that horse track, large or small?

Ans. Well, they seemed to be pretty good size horse tracks.

Ques. Did you know the horse Blair rode?

165 Ans. Yes sir, I know he rode a big mare.

Ques. Do you know the horse Shropshire was said to have been riding?

Ans. No sir, I didn't know his horse.

Ques. When you got back to the road after following this track, after finding the boots and shoe boxes—that was between the road and where Blair fell was it?

Ans. Yes sir.

Ques. When you got to the road, then what did you find?

Ans. When we got to the road, we stopped; Mr. Hargraves and I stopped where the tracks were in the road: we didn't go up there. Mr. Anderson told us they would follow those tracks and we fell out.

Ques. You don't mean to say that Mr. Hargraves didn't go there at all?

Ans. No he went afterwards.

Ques. Well, did you also go afterwards.

Ans. No sir.

Ques. You didn't go up there at all?

Ans. No sir I stayed right there.

Ques. Now did you go to Westfield and see the arrest of the defendant?

Ans. Yes sir.

Ques. What kind of a night was it, was it light?

Ans. Well, it was a bright moon shiny night. I know the moon was shining the next morning when we were at the section house.

Ques. You don't know what the condition of the night was early in the night?

Ans. I know that morning it was bright moonshine. Yes sir I think it was moonshine all night; I am almost sure of it.

Ques. Did you have any conversation with Shropshire about how this killing occurred?

Ans. Yes sir.

Ques. And before you had the conversation with him, do you know whether he was conscious of whether he was going to die?

Ans. Well I don't know sir, only what he said.

Ques. Did he say or do you know whether he was conscious or not that he was going to die?

Ans. I know what he told me; I can state just what he said.

(Objected to by defendant's counsel on the ground that the statement- of Mr. Shropshire in the trial of defendant for killing Mr. Blair are not admissible.)

Ques. About what time was it when he made the statement?

Ans. Well, it was in about ten minutes after we got there and we got there between 12 and 1 o'clock at night.

166 Cross-examination:

Ques. What time did you leave Spring to go to the scene of the killing?

Ans. I judge about one o'clock.

Ques. You say you arrived there between 12 and 1 o'clock?

Ans. Yes sir.

Ques. Who left Spring with you?

Ans. Mr. Townsend, the deputy sheriff sheriff M. A. Anderson, Frank Hargraves, and some other gentleman, I knew one of them, and one or two more.

Ques. Did you stay with that crowd during the whole search or a part of the time?

Ans. Why, practically so, yes sir.

Ques. You have said you didn't go up to the point where the killing took place?

Ans. No sir, I never did get up to where Shropshire was found.

Ques. When you stopped, did Mr. Hargraves stop also with you?

Ans. Yes sir.

Ques. Who went up to that place?
Ans. Why, sheriff Anderson and Mr. Townsend I think is all.
Ques. Did they at that time have a torch or light?
Ans. No sir I think not.
Ques. Well, ain't it a fact they had been there and left and come down there where you were; did you go up there at all?
Ans. I never went up there. Mr. Hargraves went up there.
Ques. Who went with him?
Ans. He went there by himself.
Ques. Did they leave when he went up there?
Ans. No sir, they tracked the horse for 100 or 200 yards; I don't know really how far they went.
Ques. Did they stay on this side of the woods?
Ans. Well, I don't know, I know they went off by themselves out in the road.
Ques. How far was it from where you went to where they stopped?
Ans. I expect 200 yards.
Ques. 200 yards north of you in the road?
Ans. Yes sir.
Ques. How far north of defendant's house were you when you stopped?
Ans. Well, I was right along by the road.
Ques. They were also on the road?
Ans. Well, it may be they were looking where a man fell off his horse.
Ques. You didn't go with them up to the other place?
Ans. No sir.
167 Ques. How far north of you was it when they stopped searching for tracks along the side of the road?
Ans. Well, I think 40 or 50 yards.
Ques. Did you go up the road from the defendant's house directly to where you stopped on the road?
Ans. No sir, I didn't go up the road. I went down around from the defendant's house to the patch—went down to the little place in the prairie.
Ques. Was you present when the boot was found?
Ans. Yes sir.
Ques. Where was it found?
Ans. It was found right on the prairie where we trailed the horse back on the road.
Ques. How far from the road?
Ans. I guess 30 steps.
Ques. Had there been anything found before that either by Blair or by Shropshire?
Ans. No sir, we hadn't found anything.
Ques. Do you know of anybody else finding anything?
Ans. Townsend said——
Ques. You didn't see what was found any other place?
Ans. No sir, that is all I know what Townsend said; he said he found some tin boxes.

Further direct examination:

Ques. You say you went around by defendant's house, and from there you went to where Blair was found?
Ans. Yes sir.
Ques. Now, take this diagram as drawn; this represents defendant's house, and this the road, out there is where Blair fell. Now did you go around defendant's house and through this field?
Ans. Well, we went back this way and went on this road a piece, and then turned out and went across here.
Ques. You didn't go around this way?
Ans. No sir.
Ques. You came back into the road the same way you went?
Ans. We trailed the horse back down to where Blair was; he was right here at this corner. We trailed his horse track right up here, and I stopped right there.
Ques. The question I was asking you is: I didn't understand whether you went north around his field or not?
168 Ans. I went around this field on the north and west.
Ques. After you and Hargraves stopped, you separated later on?
Ans. Yes sir, he walked up here, and I went on back to where our horses were.

J. L. TOWNSEND, called as a witness by the State, first duly sworn testified as follows:

Ques. Your name is J. L. Townsend?
Ans. Yes sir.
Ques. Where do you live Mr. Townsend?
Ans. In Spring.
Ques. How long have you lived up there?
Ans. Since 1894.
Ques. Do you know the defendant, Marcellus Thomas?
Ans. Yes sir.
Ques. How long have you known him.
Ans. I have known him for several years; I think I have known him ever since along in 1894 or 1895.
Ques. Practically ever since you have been up there?
Ans. Yes sir.
Ques. Mr. Townsend on the day or evening that Blair and Shropshire are said to have been shot, where were you?
Ans. I was at my place of business.
Ques. In Spring?
Ans. Yes sir.
Ques. What did you do when you heard of it, with reference to going where they were?
Ans. I went at once, I was called by Dr. Selleres about 8 o'clock.
Ques. That evening?
Ans. Yes sir.
Ques. Which one of them did you see first?
Ans. Shropshire.
Ques. Where did you see him?

Ans. He was lying on the road side, I guess about 1300 yards from where Blair was.

Ques. Do you know where Geo. Lindsley lives?

Ans. Geo. Lindsley and his wife were with me; their place was on one side of the road and Shropshire was right opposite.

Ques. On the left hand side of the road as you go out?

Ans. Yes sir.

Ques. What was his condition at that time?

Ans. Well, he was lying there in an awful condition, he could hardly talk, he was shot.

Ques. Well, about how long, to the best of your judgment, was it after the shooting that you got to Shropshire?

Ans. Well, I suppose I can only judge the distance Mr.
169 Shropshire traveled from the time I was called. Dr. Sellers was called I would suppose about seven or a little after, and he must have been shot about that time. Well, it was something like ¾ of a mile from where the shooting occurred to Dr. Sellers', and Shropshire had walked 1200 to 1300 yards. Dr. Sellers had to go over where Camile Thomas lived somewhere in there, and Camile Thomas came with Dr. Sellers to where Shropshire was, and I got there about as soon as Camile Thomas and Dr. Sellers got there; so we can only judge what time the shooting occurred.

Ques. How far did Dr. Sellers live from the point where Mr. Shropshire was found in the road?

Ans. I suppose, I judge the distance to be about from 600 to 700 yards.

Ques. As soon as you got the telephone message you hurried to the scene?

Ans. Yes sir, I dressed myself as fast as I could, got on my horse and rode right off.

Ques. Did you ride fast or slow?

Ans. Well, I rode very fast; before we got there we came across A. D. Sellers as we were riding along; he had told us if we came by he would go with us so we rode by Mr. Sellers', it wasn't but very little out of the way.

Ques. Mr. Townsend, when you got to Shropshire, what did he do, anything?

Ans. Yes sir, he wanted some water, and I sent Geo. Lindsley's wife and she got a glass of water, and after he drank the water why he talked around there a while and wanted to stand up.

Ques. Don't state what he said, but did he make any statement about how the affair occurred?

Ans. Well, yes sir.

Ques. He did make a statement?

Ans. Yes sir.

Ques. At that time?

—. Yes sir.

Ques. Well, did you leave him in charge of any one?

Ans. Yes sir, I left him; that is, when they told us they were coming on with Blair right away, my son and Dr. Sellers got there, they came right along; I had got Shropshire the water, and got him to

resting easy, I went on down and met the doctor and talked with Blair in the wagon.

Ques. You say Blair was in the wagon then?

170 Ans. Yes sir, lying in the wagon; they had waited for me, they wanted to take them both, so we got Shropshire and put him in the wagon.

Ques. That is when the doctor came?

Ans. Yes sir.

Ques. Then did you go on back with them?

Ans. Yes sir.

Ques. You went on back?

Ans. Yes sir, I sent my son on ahead to send a telegram to sheriff Anderson of Conroe.

Ques. Now, did you make any examination of the surroundings at that time that night, right on the scene of that shooting?

Ans. No sir, I didn't go over there; I had to take care of the wounded men.

Ques. You know nothing further than what parties told you?

Ans. No sir, no further than what parties told me.

Ques. Well, you came on back and got them relieved as much as you could?

Ans. Yes sir.

Ques. Where did you take them?

Ans. I took them to the drug store, I got them a bed from my place and put them on it.

Ques. Do you know where Blair died?

Ans. Yes sir.

Ques. Where did he die?

Ans. He died in a little room adjoining the drug store that had been used—well, it had been used for a telephone office.

Ques. Did he ever get out of that room without being carried out dead?

Ans. No sir, he was carried out dead.

Ques. Where was Shropshire when Blair was carried out dead?

Ans. Mr. Shropshire was in the back end of the drug store.

Ques. He was not moved then?

Ans. No sir, he was in the drug store.

Ques. You say that Blair and he were not in the same room at the time of Blair's death?

Ans. No sir.

Ques. How far were they apart?

Ans. Why, they were in adjoining rooms in building on the side of the drug store.

Ques. Do you know whether Shropshire was ever able to get out?

Ans. Yes sir, I think he was able to get up and walk in the room; we changed his bed after Blair died.

Ques. I mean go out and walk out doors?

Ans. No sir.

Ques. Do you know how long Shropshire lived?

Ans. Why, no.

171 Ques. Did you see him after he was dead?

Ans. No sir I didn't.

Ques. Now, Mr. Townsend, did you go out there at all before sheriff Anderson and Hargraves came down?

Ans. No sir; when we got back it was only twenty minutes of train time and Anderson was coming with the dogs and we waited for him.

Ques. He came right on, did he?

Ans. Yes sir.

Ques. Where did you go first?

Ans. We went first to Marcellus Thomas' house.

Ques. From there where did you go?

Ans. We went back from there to Camile Thomas' house.

Ques. You didn't find the defendant there?

Ans. No sir.

Ques. After you got through at defendant's house where did you go; did you go to the scene of the shooting?

Ans. We hadn't left his house yet; we could not get anybody up.

Ques. Well, what did you do after you did that?

Ans. Well, we went back and got Camile Thomas to be sure there—we took Camile Thomas to the house and had him go in to be sure there was no one in there.

Ques. Camile Thomas came with you to defendant's house, did he?

Ans. Yes sir.

Ques. Did you have any conversation with Camile Thomas that night?

Ans. Yes sir.

Ques. Did he claim to know anything about the shooting?

(Objected to by defendant's counsel——.)

Ques. Mr. Townsend, when you got up there, what did you find—did you go out to where Blair was found?

Ans. We went to where Blair was taken up, that is, where he fell off his horse farther on across the road, and then we found tracks along in the road: We didn't find anything until we struck the road a little farther up, then we went on down the road until we struck signs; what signs we could find.

Ques. What did you find there?

Ans. We found a wad in the road, on one side of the road.

Ques. Did you find any blood?

Ans. Yes sir, a spot of blood.

Ques. Did you find where any horse had wheeled out of the road?

172 Ans. Yes sir.

Ques. With reference to that spot, did you find any tracks anywhere else out on the side of the road?

Ans. There was one track where the wad was found that went back up the road, looked like it walked kind of in the road; it was very sandy and dusty and there was one track that we walk by the right side of the road up to where the blood was—a small track.

Ques. A horse's track?

Ans. No sir, a man's track.

Ques. I mean did you find any horse track out to the side of the road?

Ans. Well, right on the side of the road where the wad was found there was some horse tracks.

Ques. Was there anything peculiar about those tracks?

Ans. Well, it was a small poney's track.

Ques. Did you notice any defect in the hoof?

Ans. No sir.

Ques. Sheriff Anderson was with you?

Ans. Yes sir.

Ques. You didn't notice the notch in the horse's hoof?

Ans. No sir, not particularly. I heard others speak of it, that there was such a track in the sand, a track made by a hoof with a notch in it, but out on the side of the road it was hard, so you could hardly discover the notch, and I didn't pay any particular attention to it, and could not say I discovered anything of the kind.

Ques. It made no impression upon you?

Ans. No sir.

Ques. Now Mr. Townsend, after you discovered those signs there, where did you go?

Ans. Myself, Sheriff Anderson and my son trailed this horse track around to the public road, what we call the East Montgomery public road.

Ques. Which horse's track, that small track?

Ans. The small poney track, or a track similar to that. Then we came on back to where the other boys was and woke them up to go up town.

Ques. Well, did you go where the party told you and arrest the defendant?

Ans. Why, when we got back to Spring, I was called out by a man named West.

Ques. Well, did you go and make the arrest?

Ans. Yes sir, I went and arrested him.

Ques. Well, did the calling of you by the man have anything to do with the arrest?

173 Ans. Only he told me where he thought I could get some information.

Ques. From that information, where did you go?

Ans. I went to the saloon where the man told me, and called the man out I was told I could get information from, and got the information from him.

Ques. Well, don't go into details, but did you go where you found the defendant?

Ans. Yes sir, to Westfield, and found him at the section house in bed.

Ques. Who run that section house?

Ans. Freeman Scott.

Ques. Do you know whether he is any relation to this defendant?

Ans. No sir, possibly he married into the family some years ago and got a divorce from his wife.

Ques. Was he a negro or white man?

Ans. Negro.

Ques. Did you find any weapon there?
Ans. Yes sir, I found a shot gun.
Ques. Did you examine that shot gun?
Ans. Yes sir.
Ques. What condition was it in?
Ans. It was loaded.
Ques. Had it been recently fired?
Ans. Yes sir.
Ques. Can you tell whether or not a gun has been recently fired?
Ans. Yes sir.
Ques. Was it reloaded?
Ans. Yes sir, it had been reloaded.
Ques. Whose gun was that?
Ans. Marcellus Thomas'.
Ques. Who claimed it?
Ans. He claimed it.
Ques. Now did you have any conversation with him? Did you give him any warning?
Ans. Yes sir, I did. When I walked in the door I called him to get up; he was covered up when I walked up.
Ques. Covered up how?
Ans. He was covered up over his head with a white counterpane. As soon as I got to the door I called to Freeman Scott and he stepped in ahead, and when I stepped in Marcellus raised up, and I said to him lay back there, Marcellus until I get a hold of that gun, and when I got the gun, I told him to get up and when he got up I told him you are under arrest; any statement you make to me will be used against you in evidence and not for you.
Ques. Well, did he tell you whether he shot Ben Shropshire and John Blair?

174 (Objected to by defendant's counsel.)

Ques. Well, with reference to having shot anybody?
Ans. He said he shot them.
Ques. Did he tell you where he shot them?
Ans. He did not tell me where on the ground he shot them at; he said he shot one right at him, and the other one a little piece from him.
Q. Where was it, did he say it was down in Houston, over in Montgomery county, in New York or where?
Ans. No, he said it was over on the Wilburton road; over in that direction.
Ques. Did he say it was anywhere near his place?
Ans. Well no.
Ques. He just said over there in that direction?
Ans. Yes sir, over there in that direction.

Cross-examination:

Ques. Now state all that defendant said in that conversation about this shooting, as near as you can remember?
Ans. Well, you want me to tell just what he said to me. Well, he told me that he met up with them there in the road and that

they had asked him his name and he had told them Marcellus, and they understood him to say Dr. Sellers, and that one of them said Dr. Sellers was a white man and that he was a negro, or something of the kind; that he got away from them for a short while, or left them for a short while; that he wanted no trouble, I believed, or something of that kind; that he went on and then went down there and met up with them again, and one of them talked about a .45, and the other one talked about cutting him, that he didn't see any knife or .45, that he shot one man right at him, and the other one right across from him.

Ques. Did he say what they were doing?

Ans. He said one talked about a .45, and the other one about cutting him.

Ques. Did he say anything about what *what* they were doing?

Ans. No sir, he said he was afraid of them.

Ques. I will ask you if he didn't say that one of them attempted to cut him with a knife, and the other one spoke about a gun, and grabbed his horse by the bridle?

Ans. No sir.

175 Ques. He didn't say anything of that kind?

Ans. No sir.

Ques. But he did say that he had come in contact with them once, and got away from them?

Ans. Yes sir.

Ques. And that when he met up with them again they commenced on him again?

Ans. This is the way of it; he said he came up in contact with them again, and one talked about a 45 and the other about cutting him with a knife; that he didn't see any gun; didn't see any knife, that he was afraid of them; that he shot one, and then shot the other.

Ques. That is all you can remember now that he said?

Ans. That is all he said, he made the same statement out on the gallery.

Ques. Who was in the room at the time?

Ans. Freeman Scott.

Ques. You think when he came outside, he made the same statement?

Ans. Yes sir.

Ques. Who was with you then?

Ans. Mr. West, Sheriff Anderson, Mr. Hargraves Mr. Montgomery, and others were there; all came there at the same time.

Ques. You don't know whether they heard it or not?

Ans. Yes sir, they were right close by, I guess they heard it.

Ques. Did he say anything about why he was at that section house?

Ans. Well, no.

Ques. Didn't he say he went down there because he was afraid of meeting up with a mob?

Ans. Well, in the talk he said something of that kind.

Ques. What time did you say that was?

Ans. Well, we got there just about daylight, I guess about 5:40 somewhere along there.

Ques. That is about how far from Spring and the place of the shooting?

Ans. It is about 4 miles from Spring, and about five miles from the place of the shooting—something like five miles.

Ques. Now, you went up to the place where the killing is supposed to have taken place, then you saw where a horse had turned in the road?

Ans. Yes sir, where a horse had turned in the road.

Ques. Did you see a track of a smaller horse in the road or on the outer edge of the road?

Ans. Yes sir.

Ques. How close was that track to where this horse turned in the road?

Ans. They were right close together.

Ques. The track of the smaller horse was right on the edge of the road?

176 Ans. Yes sir, we found the tr*ial* right on the edge of the road.

Ques. Did that horse track go south; anything to indicate that the horse was going south?

Ans. No sir, we took the tr*ial* it was going north or northwest.

Ques. Wasn't there a track that came into the road along south of where the other horse turned and went due north?

Ans. Right on the side of the road, the east side we tracked the smaller horse to where this wad was found; the smaller horse went on in the road going northwest.

Ques. The other horse wheeled and went out in a southwest direction? That is, the larger horse?

Ans. Yes sir.

Ques. How far north did you follow this small track?

Ans. Well, I guess something like a half mile.

Ques. Well, about how far north of defendant Thomas' house is the point where they turned in the road?

Ans. Well, I think between 500 or 600 yards.

Ques. You say you didn't notice any peculiar marked track along there?

Ans. No sir, I did not particularly, because my eyes are not good.

Ques. You didn't see any such track?

Ans. I say my eyes are not very good, I did not notice particularly.

Ques. You didn't notice any other tracks then on this road or along the side of the road.

Ans. Along the side of the road there was some small tracks.

Ques. You didn't notice any other, except this right next to the road?

Ans. Right close to the road, is all.

Further Direct Examination:

Ques. Did you notice any horse's track up beyond that tree, between the tree near where the men were shot, about 10 or 12 feet up from where this horse turned out of the road, to the right of the road?

Ans. How is that? From where they turned out of the road?

Ques. Say this is where Blair's horse wheeled. Now, right about 12 feet from there, did you go there and examine this horse track?

Ans. No sir.

Ques. You didn't?

Ans. No sir, I didn't go any 12 feet from the road and notice any horse track.

177 JOHN EADS, called by the State as a witness, first duly sworn, testified as follows:

Ques. What is your name?

Ans. John Eads.

Ques. Where do you live, Mr. Eads?

Ans. I live in Montgomery county.

Ques. At what place, or near what place?

Ans. Near Spring.

Ques. How close to Spring?

Ans. About 4½ miles.

Ques. Did you know John Blair in his life time?

Ans. I did, for some 8 years, 7 or 8 years.

Ques. Between 7 and 8 years before his death?

Ans. Yes sir.

Ques. Did you know Ben Shropshire?

Ans. Yes sir, I worked with him about five years.

Ques. Where did Shropshire live with reference to where Blair lived?

Ans. Well, Shropshire lived at Wilburton, and Blair lived, I reckon, about ¾ of a mile from Wilburton.

Ques. They lived — about three quarters of a mile of each other?

Ans. Yes sir.

Ques. How close did you live to Blair?

Ans. Well, when this happened, Blair was living about four miles from Wilburton.

Ques. And how close to Shropshire?

Ans. Well, I think about the same distance, Mr. Shropshire was living right near him.

Ques. Was you familiarly acquainted with Blair or not?

Ans. Yes sir, I was well acquainted with him; I worked with him for quite a time.

Ques. Did you see either Blair or Shropshire after the shooting?

Ans. I did.

Ques. Where did you see them?

Ans. Well, I first seen them in Dr. Seller's office?

Ques. Where?

Ans. In Spring.

Ques. Did you have any conversation with Blair?

Ans. Why, some, yes sir.

Ques. Now, at the time of your first conversation, what did he then think with reference to whether or not he would get well?

Ans. Well, when I first seen Blair the next morning after this occurred out there, he didn't think he would have any chance; then afterwards I was in the room with him, and he thought at that time he was going to get all right—that morning.

Ques. That is the morning after the day he was shot?

Ans. Yes sir.

178 Ques. Now, did you see him and talk with him at any time after that?

Ans. Well, I talked with John Blair about three o'clock in the evening, between 2 and 3 or somewhere along there.

Ques. Was he rational at that time?

Ans. Yes sir, he seemed to be.

Ques. He was conscious and could talk to you?

Ans. Yes sir.

Ques. Did he say anything to you then that indicated whether or not he thought he was going to live?

Ans. Well, I asked Mr. Blair some questions——

Ques. I have not asked you about what you said, I asked you what he said; I have asked you if he said anything at all that indicated that he thought whether or not he was going to die? State whether or not he did?

Ans. Well, just as I told you——

Ques. State whether he did or not?

Ans. Yes sir, he did.

Ques. Well, now, state just what he said, what passed between you?

Ans. Well, I asked Mr. Blair how this trouble happened——

Ques. I have asked you what he said about whether or not he was going to live or die?

Ans. Well, I asked him that evening about it, and he said he didn't think he would live.

Ques. Did he say anything about where he was shot?

Ans. Yes sir, he said he was shot in the side.

Ques. What was it he said—that he didn't think he would live?

Ans. Yes sir, he said he didn't think he would live.

Ques. What were the words he used?

Ans. He said he was going to die, that he couldn't live.

Ques. Well, did he ever tell you how the thing happened?

Ans. Yes sir.

Ques. What did he say about it.

(Objected to by defendant's counsel because no proper predicate has been laid for the testimony, and because the same was hearsay.)

By the COURT:

Ques. Did he appear to be conscious—know what he was doing?

Ans. Yes sir.

Ques. He was in his right mind?

Ans. Yes sir.

The COURT: Objection is overruled.

Defendant's counsel excepted to the ruling of the court.

179 Ques. Go ahead now, and tell the jury what he said to you?

Ans. Well, he told me he didn't think he would live, he didn't say how long; he said he didn't think he would live; that his wound was hurting him.

Ques. Tell the jury what he said to you about how the thing happened?

Ans. Well, he told me this darkey rode a good ways behind them.

Mr. ALLEN: I object to this testimony, because there is nothing to show how this conversation came up or was brought about.

Ques. Well, was the statement voluntary?

Ans. No sir, I asked him how the accident happened, and to tell me the truth about it.

Ques. Is that all you said to him, just to tell you the truth about it?

Ans. Yes sir.

Ques. Did you say anything to him that led him to infer that you knew anything about it?

Ans. No sir.

Ques. What he said to you was wholly of his own mind?

Ans. Yes sir.

Ques. You didn't proffer any suggestions concerning it, nothing was said to him, except your question?

Ans. No sir.

Ques. Your question was just merely to direct his attention to the thing itself?

Ans. Yes sir.

Ques. Go ahead now and state what he said about how the thing happened?

Ans. Well, he said this man had rode behind them for some distance.

Ques. Who do you mean by "them"?

Ans. Why, him and Mr. Shropshire; and when he got up close to them, he merely asked him what his name was, and he told him his name was Marcellus, and he looked around, and he was right behind them—when he told him that, why he turned, he kind of turned he said and looked at him and remarked and says You are not Dr. Sellers; that he misunderst*and* him, that he understood him to say he was Dr. Sellers, and he says to him You are not Dr. Sellers, Dr. Sellers is a white man, and you are a negro; that then Mr. Shropshire turned and looked back at him, and said to him You have rode behind me far enough.

Ques. Who said that?

180 Ans. Mr. Shropshire; he told him to get in front of him, he had rode behind them far enough; that the negro then passed on by them, and the next time he saw him, the shooting occurred.

Ques. Did he say whether or not the man who called himself Marcellus, but as he thought, Dr. Sellers, had any shot gun?

Ans. No sir, he didn't have no gun; he said he didn't have no gun.

Ques. That he didn't have any gun then?

Ans. No sir.

Ques. What did he say that he and Shropshire were doing at the time the man shot him?

Ans. He said they were just riding along.

Ques. Did he say whether or not they saw the man?

Mr. ALLEN: I object to that, as to what the other man saw.

Ques. What did he say with reference to whether or not he saw the defendant just at the instant he was shot, or at the time he was shot?

Ans. He said he didn't see him.

Ques. What did he say he and Shropshire were doing at that time?

Ans. Riding along together.

Ques. How long did you remain with him at that time?

Ans. Well, I was with Mr. Blair until after four o'clock; that I. & G. N. train comes in there about 4:30; then I left and went on home.

Ques. How did you go home; on the train or on horseback?

Ans. I went on horseback.

Ques. Well, did he say whether or not he or Shropshire were armed?

(Objected to by defendant's counsel as leading.)

Ques. Did he say whether or not he and Shropshire were armed?

The COURT: I think those questions are leading.

Ques. Did he say whether or not he or Shropshire attempted to do anything to the defendant?

Ans. No sir.

Ques. Well, what did he say, if anything, with reference to whether or not he or Shropshire, either one, were doing anything to the defendant, or trying to do anything, at the time?

Ans. They were not trying to do anything.

Ques. He said they were not trying to do anything?

Ans. Yes sir.

Cross-examination:

Ques. What time did you first see Mr. Blair after he got shot?

181 Ans. Well, it must have been about 5:30 the next morning.

Ques. Did you remain with him all that time up to 4 o'clock that evening?

Ans. Not right straight along; I was in and out of the room.

Ques. Who else was with him during that time?

Ans. A good many people were in and out there.

Ques. Do you know who were in there during the time you were?

Ans. Mrs. Blair.
Ques. Any one else?
Ans. Dr. Sellers.
Ques. Any one else?
Ans. Why there were several passing in and out.
Ques. Was there any one in there during the conversation you have detailed as to how it happened?
Ans. No sir, no one was in there when we talked.
Ques. No one at that particular moment but you?
Ans. No sir.
Ques. At what particular hour in the day did that conversation occur?
Ans. I don't know; I never looked to see.
Ques. About what time?
Ans. Somewhere between 2 and 3 o'clock.
Ques. When did you first make the announcement to anybody that he had made this statement?
Ans. Well, yesterday.
Ques. When you were subpœnaed as a witness down here?
Ans. Yes sir.
Ques. You hadn't told anybody before?
Ans. No sir.
Ques. You hadn't said anything about it before?
Ans. No sir.
Ques. How did they come to know you knew about it?
Ans. Well, they just subpœnaed me; they knew I was talking to Blair.
Ques. Is it not a fact that Mr. Blair was and had been in an almost unconscious condition from the time you got there until the time you left?
Ans. No sir, he wasn't.
Ques. Was he not practically unconscious during all that time?
Ans. No sir.
Ques. He stated during the morning that he thought he was going to get well, did he?
Ans. Yes sir.
Ques. How long before this other conversation did he make that statement?
Ans. Well, I don't know; it must have been somewhere about between 11 & 12 o'clock.
Ques. He said between 11 and 12 o'clock that he thought he was going to get well?
Ans. No he said he thought he was getting along all right.
Ques. What particular thing called your attention to the fact that he wasn't getting along all right about 2 o'clock?
182 Ans. Well, he said his wound was hurting him.
Ques. He didn't say anything about when he thought he would die?
Ans. No sir.
Ques. He didn't say he thought he was going to die that night, or immediately, or anything of that kind?
Ans. No sir.

Ques. He just simply said he didn't think he would get well?
Ans. Yes sir.
Ques. He didn't say he had lost all hope of getting well; nor when he had lost all hope of getting well?
Ans. No sir.
Ques. Didn't he say he didn't know whether he would get well or not?
Ans. No, he said he didn't believe he would get well.
Ques. That he didn't believe he would get well; he wasn't sure about it?
Ans. Yes sir.
Ques. Had you said anything to him before this particular time about how it occurred?
Ans. No sir.
Ques. You decided you wouldn't ask him how this killing occurred while he was feeling well?
Ans. I didn't know but what he was feeling well when I talked with him.
Ques. But before that he hadn't told you that he wasn't feeling well?
Ans. Well, he told me his wound was hurting him.
Ques. Did you ask him about it before he told you his wound was hurting him?
Ans. No sir.
Ques. Why didn't you ask him?
Ans. When he complained about his wound——
Ques. Then you asked him?
Ans. Yes sir.
Ques. You had been with him from 10 o'clock?
Ans. Well, yes, in and out.
Ques. How much time was you in?
Ans. Well, right smart.
Ques. A good deal of the time you were there with him by yourself?
Ans. Well, yes, I would help him to coffee, but other parties would walk in for a short time and then go out.
Ques. You and he were good friends?
Ans. Yes sir, we were good friends.
Ques. You were there during the morning and the latter part of the day helping him to coffee; then he said he thought he was getting along all right?
Ans. Yes sir.
Ques. During all that time, and up to the time he said his wound was hurting him and he said he didn't think he would get well, he had not said anything about how the killing occurred?
183 Ans. No sir.
Ques. You hadn't said anything to him about how it occurred?
Ans. No sir.
Ques. Did you go into any particulars about it, in your questions?
Ans. No sir, only as to what caused the trouble.
Ques. Did you ask more than one question?

Ans. No sir, only just what had caused the trouble.
Ques. Did he tell you about where it happened?
Ans. No sir, only on the road.
Ques. He didn't say where on the road?
Ans. No sir, he just said somewhere on the road.
Ques. Did he say how long this man behind them had been riding behind them?
Ans. No sir, I don't think he did.
Ques. He didn't say anything about that, did he say how far it was—how long it was between the time he passed in front of them and went on until they were shot.
Ans. Well, I don't know as he said how long, but just a little bit, they hadn't rode but a little piece.
Ques. He didn't say how far they had gone?
Ans. Well, he said they hadn't gone very far—a short distance.
Ques. Did he say whether they had met anybody else in the meantime?
Ans. No sir.
Ques. Did you ask him whether he had a gun or not?
Ans. No sir.
Ques. Did you ask him whether Shropshire had a gun or not?
Ans. No sir.
Ques. Did you ask him whether the negro had a gun when he passed them?
Ans. No sir, he told me he didn't have.
Ques. He said the negro had been gone but a little while before he shot them, did he?
Ans. Yes sir, he said he was gone but a little while before he shot him.
Ques. This statement was made after he said his wound was hurting him?
Ans. Yes sir.
Ques. That is the only time he said anything about how it happened, it was after you asked him the question?
Ans. Yes sir.

184 Mrs. JOHN BLAIR, called as a witness by the State, first duly sworn, testified as follows:

Ques. Your name is what?
Ans. Lula Blair.
Ques. What relation were you to John Blair?
Ans. I was his wife.
Ques. Mrs. Blair, do you remember about what time he left home on the day that he was shot?
Ans. It was between 7 and 8 o'clock.
Ques. In the morning?
Ans. Yes sir.
Ques. Do you know whether or not he owned any pistol?
Ans. No sir, he didn't own any pistol not since we were married.
Ques. How long had you been married?
Ans. We had been married 18 years.

Ques. How long had you been living at Wilburton?
Ans. We were not living at Wilburton, we lived a mile and a half on the other side.
Ques. How long had you been living there?
Ans. We had been living there about ten years.
Ques. You had been living there ten years?
Ans. Yes sir.
Ques. With your family?
Ans. Yes sir.
Ques. You had a family—how many children?
Ans. Yes sir, ten children.
Ques. Now, do you know whether he had any pistol or not?
Ans. I know he didn't have.
Ques. The day that he left home?
Ans. No sir, he didn't have none.
Ques. Now, after he left home that morning, I suppose you didn't see him any more until after he was shot.
Ans. No sir, I didn't see him any more until I seen him in Spring

Mrs. Ben Shropshire, called as a witness by the State, first duly sworn, testified as follows:

Ques. Mrs. Shropshire, what is your name?
Ans. Mary Shropshire.
Ques. Ben Shropshire was your husband?
Ans. Yes sir.
Ques. Where were you living at the time he was shot?
Ans. At Wilburton.
Ques. Well, do you know whether or not he owned a pistol at that time?
Ans. No sir, he did not. He hadn't owned any pistol since we were married.
Ques. How long have you been married?
Ans. Five years.
Ques. Do you know whether or not he had any weapon at
185 all when he left home the day that he went away?
Ans. No sir, he didn't.
Ques. After he left that morning, did you see him any more until after he was shot?
Ans. No sir, I didn't.

Here the State rested its case.

Testimony on the Part of the Defendant.

Geo. Lindsley, colored, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Geo. Lindsley, is it?
Ans. Yes sir.
Ques. Where do you live George?
Ans. At Spring.
Ques. Where did you live on the 9th of October last?

Ans. At Spring.

Ques. Are you acquainted with the defendant Marcellus Thomas?

Ans. Yes sir.

Ques. Do you know where he lives?

Ans. Yes sir.

Ques. Where does he live with reference to where you live, how far?

Ans. Well, as near as I can get at it, he lived about 500 or 600 yards.

Ques. On what road?

Ans. On what is called the Wilburton road.

Ques. To Spring?

Ans. Yes sir, in that direction.

Ques. Where does Camile Thomas live with reference to where you and Marcellus lived?

Ans. Well, I suppose it is about half the distance.

Ques. Between your house and Marcellus'?

Ans. Yes sir, between my house and Marcellus Thomas'.

Ques. How far are you from Spring?

Ans. Well, I guess it is about, pretty close on to a mile.

Ques. Did you know Mr. Blair and Mr. Shropshire?

Ans. Well, I had seen Mr. Blair about three times to know him; Mr. Shropshire, I never knew him before that night.

Ques. Did you see them on the day they were shot?

Ans. Yes sir, I saw them that evening before the shooting occurred.

Ques. Where did you see Mr. Blair first?

Ans. Passing my house.

Ques. Who was with him?

Ans. This man Mr. Shropshire.

Ques. About what time in the evening was it they passed your house?

Ans. Well, I suppose, as near as I can get at it, I suppose
186 it was about half past six, maybe not that late. I had just gotten in from my work when they passed my house, it was just about dusk dark, just dark enough for me to realize men passing you knowed.

Ques. When did you see them again, if at all, that evening?

Ans. I never saw them any more until they were brought towards my place after the shooting occurred.

Ques. Who was brought there first?

Ans. The smaller man, Mr. Ben Shropshire.

Ques. Could you tell anything about their condition as they passed along to know anything about whether they were drunk or sober?

(Objected to by the State as immaterial. Objection overruled.)

Ans. No sir, I couldn't really say, because in passing my house they were as quiet as men ought to be, when they passed my place, they were quiet enough when they passed my place.

Ques. Was there anything said by either of them after the shooting and while they were near your place about whether they had been drinking or not?

Ans. Yes sir, I heard the small man say—Mr. Shropshire said they had been drinking.

(Objected to by the State as immaterial. Objection overruled.)

Ques. Where was it when he said that?

Ans. Well, they were within 75 or 100 yards of my place, right opposite my place.

Ques. How did he come to make that statement?

Ans. Well, I suppose he was coming that way to get to the doctor and got up near my place; there was a man with him who came over to my place and asked me to go over there and assist him until he could go and get a doctor for him. I says Well I don't like to have anything to do with it. He says he would like to have somebody with him, because there was nobody but himself, and he would like to have somebody with him to decide he never did do anything to him. Well, I says, I will go with you, and so I went out, and the other man went after the doctor. When I got to him he was going on and hollering, and I said My friend what is the matter with you? He says, Well, I am shot, and I says to him Well, who shot you, just so; and he says Well, I don't know, but it was a black man. I guess I was drinking—just so—I asked him, Well, what kind of a looking man was he? He said, Well, that is all I can tell you
187 about the man, he was a black man—just so—Then he asked me for a drink of water, I called to my wife to bring him a drink of water, she brought the water, and I sent her back to the house for a pillow to put under his head out in the road.

Ques. Was your wife present when he made that statement?

Ans. She wasn't present when he made that statement to me, When she came she asked him, she says Was you one of the men that passed the house a little while ago? And he says yes ma'am, I am one of the very same men. Then about that time Homer Townsend came up with some other gentlemen with him, could not say who they were, because I was not acquainted with them.

Ques. How long had it been from the time they passed your house, riding by on the road until he was brought back or came back to your house?

Ans. Well, until he came back to my house—I suppose more than an hour.

Ques. Did you hear the shots fired in the road?

Ans. Yes sir, I heard the shots.

Ques. Before he came back?

Ans. Yes sir.

Ques. How long had it been after they passed your house until you hear- those shots?

Ans. At least 30 minutes after they passed my house until I heard the shots—may be more than that.

Ques. Were they riding on horseback or in a wagon?

Ans. When they passed my house—I could hear them talking—they were riding horseback, both of them.

Ques. Riding in a trot or walk?

Ans. No sir, they were walking—the horses were walking along.

Ques. At the rate they were going, how long would it have taken them to have gone to Marcellus Thomas' house?

(Objected to——).

Ques. What was the distance then from your place down to Marcellus Thomas' house they way that road leads around that way?
Ans. Well, 500 or 600 yards; as near as I can guess at it, from my place.
Ques. George, how long have you known the defendant?
Ans. Well, pretty close on to five years, I have been acquainted with him. He has worked with me lots of times.
Ques. Do you know his general reputation in that com-
188 munity in which he lives——
Ans. Well, yes sir.
Ques. As to whether or not he is a quiet, peaceable, law-abiding citizen?
Ans. That is the way I have known him.
Ques. Do you know it?
Ans. Yes sir, that is all I know.

(By the COURT:)

Ques. Do you know it? say yes or no?
Ans. I know myself about him.

(By the COURT:)

Ques. Reputation is what the community say about him; what the people say about him. Do you know anything about that? say yes or no?
Ans. Yes.
Ques. What is that reputation with reference to being a quiet, peaceable, law-abiding citizen—good or bad?
Ans. Good, he is a good man.

Cross-examination.

Ques. Will you name the people who say his reputation is good?
Ans. Well, as a general thing for a person to go to work and specify all the names, I could not very well do that.
Ques. You could not name a single man up there you ever heard say that the reputation of Marcellus Thomas was that of a peaceable, quiet, man, can you?
Ans. I don't know as I could go to work and specify any certain names.
Ques. I will ask you if it is not a fact that Marcellus Thomas is not considered as a bad negro up there, and if the negroes are not afraid of him?
Ans. No sir.
Ques. Do you know Mr. J. L. Townsend?
Ans. Yes sir, I do.
Ques. Does he know everybody up there?
Ans. I suppose so.

Ques. He is in business up there, is deputy sheriff, and in a position to know the sentiment of the people up there, ain't he?

Ans. Yes sir.

Ques. Now, George, what was you doing when these men passed your house?

Ans. When they passed my house, I was making preparations to wash my face and eat supper.

Ques. Well, did you conclude your preparations to wash your face?

Ans. When they passed my house? yes sir.

Ques. You finally washed your face?

Ans. Yes sir, I did.

Ques. Had you gotten through washing your face when you heard those shots?

Ans. Yes sir, at that time I had done eat my supper.

189 Ques. You done eat supper?

Ans. Yes sir, I done eat supper and was sitting around reading.

Ques. What kin are you to Marcellus?

Ans. None whatever.

Ques. Is he any by marriage?

Ans. None whatever.

Ques. Belong to your church?

Ans. No sir.

Ques. Your lodge?

Ans. No sir.

Ques. You don't belong to any society?

Ans. Me?

Ques. You and him?

Ans. I belong to church society.

Ques. Do you belong to the same one he and his wife do?

Ans. No sir.

Ques. Nor any of his folks?

Ans. No sir.

Ques. His mother, nor none of them?

Ans. No sir.

Ques. He don't belong to church?

Ans. Well, his mother belongs to church.

Ques. You are good friends?

Ans. Well, we have been.

Ques. Close neighbors?

Ans. Yes sir.

Ques. What do you do for a living?

Ans. Well, I carpenter, mend shoes and work around.

Ques. How long have you lived up there?

Ans. I have been there going on five years now.

Ques. Who knows your reputation up there?

(Objected to.)

Ques. Well, how do you know that the shots you heard were the shots that killed those two men?

Ans. Well, I don't know it; I could not say I know it any more than what the men told me; they say that only two shots were heard that night.

Ques. You don't mean to say that there is not shooting going on daily around in that country?

Ans. That is a question — has nothing to do with the shots that night.

Ques. Will it suit you just as well to answer my question?

Ans. Yes sir.

Ques. You don't know whether other shots were fired in that neighborhood or not?

Ans. I didn't hear any.

Ques. That is all you can say, you didn't hear any. Where was you when you heard those shots?

Ans. I was at home.

Ques. Where was you, in the house or out of doors?

Ans. In the house.

190 Ques. Had you gone to bed?

Ans. No sir, I hadn't gone to bed.

Ques. What time of night was it when those shots were fired?

Ans. Well, really, I could not specify the hour of the night, because I didn't pay that much attention to it until the men were brought up to my place, then I began to realize the matter.

Ques. You said a while ago that it was just dark enough so you could realize who the men were, is that so?

Ans. Yes sir, it was.

Ques. You realized them as they passed there that evening?

Ans. Yes sir.

Ques. Which one did you realize was on the right side of the road, and which one did you realize was on the left side of the road, *and* they rode past your house?

Ans. The smaller man was a little behind.

Ques. Which side of the road was he on?

Ans. Well, he was on the north side of the road, the main road going out from Spring past my place on the south side of my house.

Ques. They were riding right in the direction of Wilburton, the road they were on?

Ans. Well, it is a pretty round about way.

Ques. Well, it runs in that direction, don't it?

Ans. The road out from Spring runs over west.

Ques. Which way were they going, were they going towards Wilburton or going towards Spring?

Ans. Towards Wilburton.

Ques. Which one was on the right and which one was on the left, of those men?

Ans. They really didn't ride side by side.

Ques. Were they on the same side of the road?

Ans. Yes sir, both were on the same side of the road, the right side of the road, both of them.

Ques. You don't know how they were afterwards?

Ans. No sir.

Ques. How far did you notice them?

Ans. I didn't notice them any more after they passed my house.

Ques. In passing your house you say they were quiet and orderly?

Ans. Yes sir.

Ques. Nothing unusual about them at all?

Ans. No sir, nothing unusual, only they were talking.

191 Ques. Tell this jury why that man who was shot so that he died in a few days should tell you that he was drinking?

Ans. I don't really understand you.

Ques. Tell this jury why it is that that man who was shot so that he died in a few days from that night should tell you when you came down there to him that he was drinking or was drunk and for that reason he didn't see the man who shot him?

Ans. I don't understand yet?

Ques. I don't either, that is what I am asking you about now. You say he told you he was drinking, and for that reason could not see the man who shot him.

Ans. He didn't say that, he didn't say he didn't see the man who shot him, he told me that it was a black man that shot him.

Qes. Then he did see him?

Ans. Yes sir.

Ques. What did he say? that he was drunk and could not see the man?

Ans: No, he said he could not exactly tell who he was, but it was a black man.

Ques. Now, George, you were here at the *habeas corpus* hearing in this matter?

Ans. Yes sir.

Ques. You was not put on the stand by the defendant?

Ans. No sir.

Ques. Did you talk to me and tell me what your testimony would be.

Ans. No sir, I never saw you before.

Ques. I mean did you tell me that when you were down here then?

Ans. No sir, I never saw you before.

Ques. You know that Judge Allen was in there representing Marcellus?

Ans. Yes sir, I know he was.

Ques. Did you have any talk with him?

Ans. No sir, I didn't have any talk with him.

Ques. Did he have you summoned or did you come down on your own hook?

Ques. I know he summoned me the same as I came down this time.

Ques. Mr. Allen didn't talk with you?

Ans. No sir, he didn't have anything to say to me.

Ques. Who did you talk to about the case?

Ans. You are the first man I talked to.

192 Ques. I am the first man you ever talked to about the case at all?

Ans. No sir, not to talk to at all, you are the first man I told anything about it here.

Ques. In Houston?
Ans. Yes sir, in Houston.
Ques. Who was the first man—you answer my question—who was the first person you ever talked to about what you knew and were going to testify to in this case?
Ans. Well, I don't know, the only man I remember of saying anything to about it was Ed. Rolland.
Ques. Another negro?
Ans. Another colored man.
Ques. Ain't it a fact that in a conversation in the hall way of the Court House here in Houston, I asked you what you knew about this case, and you told me that Mr. Shropshire told you that he did not see or could not see who it was shot him; that the man wasn't exactly in sight when he was shot. Didn't you tell me that right there in the Court House when I called you off to one side and asked you what you knew, didn't you tell me that Mr. Shropshire told you that he didn't see the man who shot him?
Ans. No sir.
Ques. Will you swear you didn't do it?
Ans. Yes sir.

IZELLA THOMAS, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Where do you live?
Ans. At Spring.
Ques. Are you related to Marcellus Thomas?
Ans. Yes sir.
Ques. He is your brother?
Ans. Yes sir.
Ques. Do you remember the night Mr. Shropshire and Mr. Blair, the two men said to have been killed near your house that night?
Ans. Yes sir.
Ques. Did you see those two men that evening before they were shot?
Ans. Yes sir.
Ques. Where did you see them?
Ans. I seen them north in the road; I seen them at the north end of the lane from Marcellus' house.
Ques. Is that on the road leading to Wilburton or in that direction?
Ans. Yes sir.
Ques. Which way were they going when you saw them?
193 Ans. They were going towards Wilburton.
Ques. Did you see Marcellus that evening?
Ans. Yes, sir.
Ques. Where did you see Marcellus?
Ans. I saw Marcellus just as he was leaving Camile's; he got there about twenty minutes before I got there.
Ques. Was that before or after you met those men?
Ans. That was after I had met them.

Cross-examination:

Ques. You are Marcellus' sister—married or single?
Ans. Single.
Ques. You live at home with your mother?
Ans. Yes, sir.
Ques. You say you live at home with your mother?
Ans. Yes, sir.
Ques. Where does your mother live from Marcellus' house, which way, west or north?
Ans. North.
Ques. How far from Marcellus?
Ans. I don't know, sir, how far it is.
Ques. About how far?
Ans. Well, it is a mile, I guess.
Ques. Well, is it farther than Camile lives from Marcellus?
Ans. Yes, sir.
Ques. How much farther—tell us how far it is?
Ans. I don't know, sir, how far.
Ques. Is it a good deal farther or not?
Ans. Not so very far.
Ques. Is it a good deal farther than it is from Marcellus' to Camile's?
Ans. Yes, sir, a good little piece farther.
Ques. Where were you going at the time?
Ans. I was going to Camile's.
Ques. What were — going down there for?
Ans. Well, just walking around.
Ques. Just walking around by yourself?
Ans. No, sir.
Ques. Who was with you?
Ans. A young gentleman.
Ques. What was his name?
Ans. James Jones.
Ques. It took you and him 20 minutes to go from a point north of the end of the lane down to Camile's house. You must have walked pretty slow?
Ans. We were walking very slow.
Ques. Did you stop on the road?
Ans. No, sir.
Ques. You say when you got down there you met those two gentlemen, Mr. Shropshire and Mr. Blair up there above Marcellus' house?
Ans. No, sir, I didn't say that.
Ques. Well, where did you say you met them?
Ans. I say I met two men at the north end of the land before you get to Marcellus' house.
194 Ques. The north end of what lane?
Ans. The lane from Marcellus' house.
Ques. The north end?
Ans. Yes, sir.

Ques. Before you get to Marcellus' house, going which way?
Ans. Going towards his house.
Ques. Well, I can't understand it. Now, look at this little map; this is where Geo. Lindsley lives; here is where Camile lives. Now, do you know where that culvert is there in the road.
Ans. Yes, sir.
Ques. Now, Camile's house is on the left hand side of the road as you go out of Spring, is it not?
Ans. Yes, sir.
Ques. Here is Marcellus' house; there is a lane that runs between this field and somebody's else field; here is the road. Now, where was you, along in that road wasn't you?
Ans. Yes, sir.
Ques. Well, where was you, was you between Camile's house and Marcellus' house or was you up beyond Marcellus' field?
Ans. When I met the men?
Ques. Yes.
Ans. I was down below here at the north end of that lane.
Ques. The north end of which lane?
Ans. This lane.
Ques. Between his field and there?
Ans. Yes, sir.
Ques. Well, if you were at the north end of this lane you was at the far end away from Spring wasn't you?
Ans. I don't know about that.
Ques. Ain't Wilburton north of Spring?
Ans. Yes, sir.
Ques. Then if you were at the north end of the lane between his field and another field, you must have been away from Spring, wasn't you?
Ans. Yes, sir.
Ques. You were away from Spring, and his house is between you and Spring?
Ans. Yes, sir.
Ques. Marcellus' house?
Ans. Yes, sir.
Ques. You was at the north end of that lane?
Ans. Yes, sir.
Ques. Now, at the north end of that lane—Does that come into this road, into the Wilburton road?
Ans. Yes, sir.
Ques. There are two roads there, one goes to the left where Marcellus lives and the other goes around by his house, an old road; ain't that right?
Ans. Yes, sir.
Ques. Now they were up here at the end of this lane you say. Were they in this Wilburton road that runs to the left of his house?
Ans. Yes, sir.
Ques. They were in that road?
Ans. Yes sir.

Ques. Then when you got away down here to Camile's 20 minutes afterwards Marcellus was just leaving Camile's?
Ans. Yes sir.
Ques. Did he have a gun with him then?
Ans. I don't know, sir.
Ques. You don't know whether he had a gun or not. Was he riding or walking?
Ans. Riding.
Ques. What kind of a horse was he riding?
Ans. A bay horse.
Ques. Small or large?
Ans. Pretty good size.
Ques. Was that the same horse he was riding the next day when he was arrested?
Ans. Yes sir.
Ques. Whose horse was that?
Ans. His horse.
Ques. Who was with him at the time?
Ans. He was by himself.
Ques. Was he riding slow or fast?
Ans. Well he was riding pretty slow.
Ques. Did you speak to him?
Ans. Yes sir.
Ques. Did you have any conversation with him?
Ans. No sir.
Ques. What did you say to him—Marcellus?
Ans. I just spoke to him as he went by.
Ques. You said How de do, or good evening, did he speak to you?
Ans. No sir.
Ques. He didn't speak?
Ans. No sir.
Ques. Did he ask you about any men up the road?
Ans. No sir, he didn't ask me about any men at all.
Ques. He never said a word?
Ans. No sir.
Ques. You had already seen the men away up beyond his field at that time?
Ans. Yes sir.
Ques. He was there at Camile's house when you got there—you went to Camile's house?
Ans. Yes sir.
Ques. You said he was just leaving when you got there?
Ans. Yes sir.
Ques. The- he was already on his horse?
Ans. Yes sir.
Ques. How do you know he had been there before you got there?
Ans. I saw him there before I got there.
Ques. How could you see him if he was in the house?
Ans. I saw him come out and get on his horse.
196 Ques. You saw him get upon his horse and start to ride away?
Ans. Yes sir.

Ques. He rode on towards you and this young man you spoke of, James Henry Jones?

Ans. No, James Jones.

Ques. That is all you know about the case, is it?

Ans. Yes sir.

Ques. Well, did you see Marcellus after the shooting?

Ans. No sir, I didn't.

Ques. How soon after you saw him riding up in that direction with that shot gun—did you hear the shots?

Ans. Yes sir, I heard the shots.

Ques. How soon after he *road* away up in that direction with that shot gun——

Ans. I didn't say he had a shot gun.

Ques. You said you couldn't tell whether he had a shot gun or not?

Ans. No sir.

Ques. How soon after you saw him ride away from Camile's house, after you saw those other men up at the north end of that lane, how soon after that was it you heard the shots?

Ans. I don't know, sir, how long, I suppose 5 or 10 minutes.

Ques. Well, had you had time to get into Camile's house?

Ans. Yes sir.

Ques. How long had you been in there; had you had time to get seated?

Ans. Well, we had been in there 2 or 3 minutes.

Ques. Two or three minutes, you say?

Ans. It may have been longer.

Ques. How much longer?

Ans. I don't want to guess at it.

Ques. Was it longer than five minutes?

Ans. Well, I don't want to guess at it, I don't know.

Ques. Well, what had you done after you got to Camile's, before you heard the shots?

Ans. I hadn't done anything.

Ques. Well, did you go in and sit down?

Ans. Yes sir, when I got there I went in and set down.

Ques. What becames of James Jones?

Ans. He was there.

Ques. You judge you had just got in and sat down when you heard the shots.

Ans. Yes sir.

Ques. You had just gone in and sat down, when you heard the shots; that is as near as you can get it, is it?

Ans. Yes sir.

Ques. When you met those men how were they riding, slow or fast?

Ans. They were riding slow.

Ques. Did you know them?

Ans. No sir, I didn't know them.

197 Ques. Could you tell which one was on the right side of the road and which one was on the left?

Ans. No, sir, I didn't notice that much.

Ques. Which way was Marcellus riding; was he riding north when you met him?
Ans. Yes, sir, going towards his house.
Ques. Going in that direction?
Ans. Yes, sir.
Ques. Do you know where his wife was then?
Ans. No, sir, I don't know where his wife was.
Ques. Was she at Camile's house at that time—I mean when you got there?
Ans. No, sir.
Ques. She wasn't there at that time?
Ans. No, sir.

VICTORIA LINDSLEY (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Victoria, where do you live?
Ans. In Spring.
Ques. Where did you live on Oct. 9th?
Ans. In Spring.
Ques. Do you live right at the town of Spring or north of Spring?
Ans. North of it about a mile and a quarter.
Ques. A mile and a quarter right straight north?
Ans. Yes, sir.
Ques. Did you hear of the shooting up there about that time?
Ans. I did.
Ques. Now, on that same evening did you see Mr. Blair and Mr. Shropshire?
Ans. Yes, sir.
Ques. The two men who were shot?
Ans. Yes, sir.
Ques. Where did you first see them?
Ans. Well, when I first saw them they were in Spring Station.
Ques. What were they doing when you first saw them?
Ans. When I first saw them when I was coming home they were cursing each other, and when I got close up to them they were on their horses, and Mr. Blair pulled Mr. Shropshire off.
Ques. Did you notice their condition as to whether they had been drinking or not at that time?
Ans. Well, I am not much of a judge of anything like that, but I suppose that they may have been, but I don't know that to be a fact.
Ques. I will ask you to state whether or not they were having any trouble with anybody else?

(Objected to by the State as immaterial. Objection sus-
198 tained by the Court, to which ruling counsel for defendant excepted.)

Ques. How long did they stay there?
Ans. Well, I just could not state how long they stayed there, they were there when I left.
Ques. Did you see them drink anything while you were there?

Ans. I did not.

Ques. Did you see them take anything out of the store with them?

Ans. Mr. Gaedeke was wrapping up something for them; I know they tied some bundles on their saddles.

Ques. Did you see what they put in those bundles?

Ans. No, sir.

Ques. After they left the store, did you see them again?

Ans. I did.

Ques. How long before they left the store did you leave?

Ans. They left me, you might say, they were coming from the store when I passed them.

Ques. Where were they, were they stopped any where there?

Ans. No, sir, they were just a little piece from the store.

Ques. Upon the side of the road?

Ans. Yes, sir.

Ques. Did they get off their horses at that time?

Ans. They did not.

Ques. Well, did you see them again after that?

Ans. Yes, sir, I did.

Ques. What time was that you met them there—about what time?

Ans. Well, I guess it was about six o'clock when I left.

Ques. Just after you quit work?

Ans. Yes, sir.

Ques. Now where did you see them next after you passed them there at the store?

Ans. They passed me on the road.

Ques. How far had you gone before they passed you?

Ans. Not so very far.

Ques. Well, did you see them after they had passed you?

Ans. I did.

Ques. What were they doing then?

Ans. They were in the road, and one of them got off his horse and the other stayed on.

Ques. Did you see them more than once in the road?

Ans. I did. I saw them get off twice, and one of them worked at something on the other side of his horse.

Ques. How far did you go up the road in sight of them?

Ans. Well, about a half mile.

Ques. Did you live above Geo. Lindsley?

Ans. I did.

Ques. Did you live below Camile Thomas'?

Ans. I did.

Ques. Did you see them as they passed Lindsley's?

Ans. Yes, sir.

199 Ques. Did you see them as they came past Camile Thomas'?

Ans. I did not.

Ques. How far is Camile's from Marcellus'?

Ans. I would say about a quarter of a mile; I would suppose it to be that far, I don't know really.

Ques. Were you right along behind them until they got out of sight?

Ans. I was not. When they got up by Mr. Lindsley's, they turned off and went around this place and then came back to the road.

Ques. Did you see them again after they came out in the road?

Ans. Yes sir.

Ques. Where did you go in the meantime.

Ans. When they were going around? I was still in the main road; they were riding and I was walking. I just seen them in the same road as they went around his house and came back.

Ques. Did you see them get off their horses any more?

Ans. Not after they passed me.

Ques. Did you see them drink any on the way?

Ans. I did not see them drink, but we saw bottles they throwed out supposed to be beer bottles, but we didn't see them drinking.

Ques. Who was with you?

Ans. My step-mother.

Ques. Where were they when you last saw them?

Ans. Crossing the bridge.

Ques. Just below Camile's?

Ans. Just below Lindsley's house.

Ques. Did you see Marcellus Thomas that evening?

Ans. No sir, I didn't see him at all.

Ques. You didn't see him at all that evening?

Ans. I did not.

Ques. During the time you were upon the road, and the last you saw of them, did you see Marcellus Thomas or any other person go past them?

Ans. I saw no person at all from the time they left the bridge.

Ques. From what you saw of them could you say whether or not they had been drinking, or were in a state of intoxication?

(Objected to by State as already answered.)

Ques. Do you know whether or not they were drunk?

Ans. I don't know; I never saw them drinking anything; I am not any judge of drunk- men, I don't suppose.

Cross-examination:

Ques. You live up north along there?

Ans. I do.

Ques. On which side of the Wilburton road, the right or left?

200 Ans. On the left.

Ques. Where do you live with reference to John Brady?

Ans. John Brady lives between my house and Spring.

Ques. You live out in the same direction, you live on the road he lives on?

Ans. Not out in the same direction; the road goes this way by his house, then it turns that way to go to my house.

Ques. Well do you live on the Wilburton road?

Ans. Yes sir.

Ques. You go out the same road a part of the way?

Ans. Yes sir, a part of the way.

Ques. How far do you live from that Wilburton road?
Ans. I don't live anywhere, you might say.
Ques. You live somewhere; where on that road?
Ans. Not more than a yard's distance, you might say right on the road.
Ques. On the Wilburton road?
Ans. We call it the Montgomery road.
Ques. I mean this road these men were riding on. You said they were going on in front of you the last you saw of them when they were crossing the bridge south of Camile Thomas'?
Ans. Now I understand you, you are speaking of the road the men were on; I live on the Wilburton road, but a different part of the road.
Ques. Now, since you understand me, how far do you live from the road those men were traveling?
Ans. Well, the road they had to go, I live about a quarter of a mile.
Ques. You went on home?
Ans. I did.
Ques. You was with your mother in law?
Ans. No my step mother.
Ques. Any one else besides her?
Ans. There wasn't any one with me but her, but Mr. and Mrs. Brady passed us in a buggy.
Ques. They were traveling that road about the same time?
Ans. Yes sir.
Ques. I believe you stated you didn't see them pass Camile Thomas'?
Ans. I did not.
Ques. You only saw them to the bridge south of his house?
Ans. Yes sir.
Ques. Do you know how far that little bridge is south of his house?
Ans. It is not very far; I really could not state the distance.
Ques. It was getting dark then?
Ans. It was.
Ques. Now you say that Mr. Getege took some bundles out and tied on their saddles?
Ans. Yes sir.
201 Ques. You left home you said about six o'clock to go to the store?
Ans. No sir, I was going home from work and came by the store.
Ques. Where did you work.
Ans. At Mrs. Townsend—Sheriff Townsend's.
Ques. You work out?
Ans. Yes sir.
Ques. You left your work about six o'clock?
Ans. Yes sir.
Ques. You saw these men at the store?
Ans. Yes sir, at the store.
Ques. Well, you hadn't done your trading yet?

Ans. No sir, I came by there to do that.
Ques. How long did it take you to do your trading.
Ans. Well, it didn't take me very long after Mr. Getge got through waiting upon them.
Ques. Then did you go on home?
Ans. I went on home, yes sir.

LUCY SILAS (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Lucy Silas, is it?
Ans. Yes sir.
Ques. Where do you live?
Ans. At Spring.
Ques. Right at the town of Spring or north of the town?
Ans. North of it.
Ques. Do you and Victoria Lindsley live together?
Ans. No sir.
Ques. How far apart do you live?
Ans. Well, I reckon it is about 600 yards.
Ques. Do you remember the time some men were shot up there near Spring about the 9th of October?
Ans. Yes sir, I heard of it.
Ques. Now upon that evening the shooting is supposed to have taken place, did you see those men, Blair and Shropshire?
Ans. Yes sir, I saw them.
Ques. Who was with you when you saw them?
Ans. Victoria Lindsley.
Ques. Where were they when you first saw them?
Ans. They were about 100 yards from Spring.
Ques. What were they doing?
Ans. They were fooling along the road.
Ques. Did you see them before they left the store?
Ans. Yes sir, I went to the store.
Ques. Did you see them while you were there?
Ans. I did.
Ques. Did you leave before they did?
Ans. Yes sir, we left before they did.
Ques. Did you see them after they left there?
Ans. Yes sir.
Ques. How many times did you see them?
Ans. I saw them once.
Ques. Where were they then?
Ans. They were riding along the road.
202 Ques. Did they pass you?
Ans. Yes sir.
Ques. What did you see them do while going along the road, anything, stop, or anything of that kind?
Ans. Yes sir, they stopped.
Ques. How many times?
Ans. I never saw them stop but once, and got off their horses (I was scared of them).

Ques. I will ask you to state what they were doing when they got off their horses; what did they stop for?
Ans. I don't know, sir, what it was about.
Ques. How far up the road did they go before you lost sight of them?
Ans. Well, I could not tell you exactly how far.
Ques. Do you know where Camile Thomas lives?
Ans. Yes, sir.
Ques. Do you know where Geo. Lindsley lives?
Ans. Yes sir.
Ques. Had they got past Lindsley- house?
Ans. No sir, they hadn't passed Lindsley's house the last I saw them.
Ques. How long were they where you could see them in the road or along the road?
Ans. Well, I don't know how long it was, I was frightened, and could not tell you exactly how long it was, I was scared.

(State's counsel objected to the answers of the witness as being scared.)

Ques. Where were they the last you saw of them?
Ans. They were in the road.
Ques. How far from Lindsley's and Thomas' house?
Ans. I don't know sir how far.
Ques. You couldn't tell exactly where they were?
Ans. No sir.
Ques. Did you see anybody else go along there besides those men?
Ans. Yes sir, Mr. Brady.
Ques. Anybody else?
Ans. No sir.

Cross-examination:

Ques. You don't know where Marcellus Thomas was then?
Ans. No sir.
Ques. You don't know whether he came along behind you or not?
Ans. No sir.
Ques. It was getting dark, was it?
Ans. Yes sir.

ELLA BALDWIN (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Ella Baldwin? is it?
Ans. Yes sir.
Ques. Where do you live?
Ans. I live in Spring.
Ques. Do you remember the time of a shooting up above Spring when Mr. Blair and Mr. Shropshire were shot?
Ans. Yes sir.
203 Ques. Where were you on that day?
Ans. I was at Camile Thomas'.

Ques. Did you see those two men that evening when they passed Camile Thomas'?
Ans. Yes sir.
Ques. About what time was it?
Ans. I don't know.
Ques. Was it dark or near dark?
Ans. Yes sir, it was dark.
Ques. How were they going by, walking or riding?
Ans. They were going on horseback when they passed the house.
Ques. Now, who was there when they pas-ed Camile Thomas' house?
Ans. Izella Thomas and James Jones.
Ques. Was Camile's wife there that evening?
Ans. Yes sir.
Ques. Did you see Marcellus Thomas that evening?
Ans. Yes sir.
Ques. Before or after they passed?
Ans. After.
Ques. How long after?
Ans. Well, I don't know; 5 or 10 minutes.
Ques. Did you see him when he came up—Marcellus?
Ans. Yes sir.
Ques. Which way did he come from?
Ans. He came from towards Spring.
Ques. How long did he stop, or did he stop?
Ans. Yes sir, he stopped, and laughed and talked, and shook hands with us, then went on up the road, riding.
Ques. Well, which way did he go?
Ans. After he stopped and talked a while, he said he had to go to his house.

(Objected to by the State as a self serving declaration.)

Ques. What is Camile Thomas' wife's name?
Ans. Viola.
Ques. Were you pretty well acquainted with her?
Ans. Yes sir.
Ques. How long had you been at Camile's?
Ans. I don't know, I guess about an hour.
Ques. How far did you live from there?
Ans. I lived at Westfield.
Ques. At Westfield, that is five or six miles from there?
Ans. Yes sir, I just went over there to stay with the girls.
Ques. What girls?
Ans. Why, the Thomas girls.
Ques. You were just visiting over there?
Ans. Yes sir.
Ques. That is how you happened to be there that evening?
Ans. Yes sir.
Ques. Now when those men rode by there on horseback along the road, did they ride along in an ordinary walk?
Ans. Yes sir.

Ques. They were gone how long did you say before you saw Marcellus?

Ans. Well, about 25 or 30 minutes.

204 Ques. And after Marcellus came to the house and talked and laughed there a while?

Ans. Yes sir.

Ques. Did he get down and come in?

Ans. No sir, he sat on his horse.

Ques. Did he have a shot gun with him?

Ans. No sir, I could not say, I did not see any shot gun.

Ques. Well, you were right at him, talking with him?

Ans. Yes sir.

Ques. You shook hands with him, did you?

Ans. No sir, I never shook hands with him.

NOTE.—Right after the objection on page 73 (203) as to self-serving declaration defendant's counsel continued the direct examination as follows:

Ques. Which way did he go, did you see him leave?

Ans. Yes sir, I saw him leave.

Ques. Did he go north or south?

Ans. He went north.

Ques. How far is it to his house from Camile's—Marcellus' house?

Ans. Well, I couldn't say.

Ques. Well, about how far?

Ans. I don't know exactly.

Ques. You don't know the distance?

Ans. No sir.

Cross-examination:

Ques. What did you say your name was?

Ans. Ella Baldwin.

Ques. What kin are you to the defendant, Marcellus Thomas?

Ans. I am no kin at all.

Ques. Any kin to his wife?

Ans. No sir.

Ques. To none of them, not by marriage or any other way?

Ans. No sir.

Ques. Are you married or single?

Ans. Single.

Ques. Was you lying out on the gallery when he rode away?

Ans. Yes sir.

Ques. *Ques.* Who was with you?

Ans. Camile Thomas' wife.

Ques. You were all lying down?

Ans. Yes sir laying down on the porch.

Ques. On the bare porch floor?

Ans. No sir on a mattress.

Ques. You and Camile Thomas' wife were lying there upon the gallery?

Ans. Yes sir.

NOTE.—Go back to the question as to Camile Thomas' wife's name and balance of pp. 73 and 74 (203 & 204) after witness states she never shook hands with Marcellus Thomas, continue as follows:

Ques. How close was you to him?
Ans. Well——
Ques. Point out something here in the room?
Ans. About as close as from here to that railing.
205 Ques. Inside there?
Ans. Yes sir.
Ques. Well, how far is that?
Ans. About 20 feet.
Ques. Ain't 15 feet more like it?
Ans. Yes, sir, may be so.
Ques. About 15 feet?
Ans. Yes, sir.
Ques. Well, did he have a shot gun or not?
Ans. If he did, I didn't see anything of it.
Ques. If he had any he had it in his pocket, did he?
Ans. Well, I didn't see any shot gun; he didn't have anything in his hands.
Ques. Well, now Ella, just as he rode away, what did you all do, remain lying on the gallery there?
Ans. Yes, sir.
Ques. Where was Camile Thomas at the time?
Ans. I don't know where he was.
Ques. How soon after that did he come?
Ans. I don't know, I went off.
Ques. Well, how long did you stay there after Marcellus rode away?
Ans. Well, about a half hour.
Ques. You stayed a half hour?
Ans. Yes, sir.
Ques. Did you hear any shots fired?
Ans. Yes sir, I heard shots fired.
Ques. How many times?
Ans. Twice.
Ques. How long after Marcellus left there?
Ans. Well, I don't know, I guess about a half hour.
Ques. Well, the other men had been gone 25 or 30 minutes before you saw Marcellus there?
Ans. Yes, sir.
Ques. So it was nearly an hour after they left before you heard the gun fire?
Ans. Well, I could not say for certain.
Ques. Well, did you know Ben Shropshire?
Ans. No, sir.
Ques. Did you know Mr. John Blair?
Ans. No, sir, I don't know as I knew him; I have heard people call his name.

Ques. You don't know whether that was Mr. Blair and Mr. Shropshire passing along there or not?
Ans. No, sir.
Ques. You just saw two men riding along there something like 25 minutes before Marcellus Thomas came there, and it was about a half hour after he was gone that you heard the shots?
Ans. Yes, sir.
Ques. Which would put it about 55 minutes, or five minutes less than an hour. You didn't know — those men were then?
Ans. No, sir.
Ques. What kind of horses were they riding?
Ans. I don't know that.
Ques. You said a while ago it was dark, you could not see
206 what kind of horses they were.
Ans. Well, I guess I could if I had noticed, but I didn't have that in mind.
Ques. Did anybody come to Marcellus' house just as he was riding away?
Ans. Marcellus' house?
Ques. I mean Camile's house?
Ans. No, sir.
Ques. Well, just before he rode away?
Ans. Yes, sir.
Ques. Who were they?
Ans. Izella Thomas and James Jones.
Ques. They came up just as he rode away?
Ans. Yes, sir.
Ques. Where was his wife?
Ans. Marcellus' wife?
Ques. Yes?
Ans. I guess she was at home.
Ques. Did she come down to Camile's while you were there?
Ans. No, sir.
Ques. Did you see her that night at all?
Ans. Yes, sir, I seen her after the shooting, about an hour and a half.
Ques. Where did you see her?
Ans. Down at Camile's.
Ques. You went back to Camile's did you?
Ans. Yes, sir, I went back down there.
Ques. What caused you to do that?
Ans. I was walking around.
Ques. Who was you walking with?
Ans. With Iselle Thomas.
Ques. What did you do with James Jones?
Ans. We left him there.
Ques. You and her went walking about in the night? for what?
Ans. Well, we went down to Marcellus' mother-in-law's home.
Ques. That was away beyond his house?
Ans. Yes, sir.
Ques. You went right in the direction the shooting occurred?

Ans. Yes, sir.
Ques. Where was you when it did happen—the shooting happened?
Ans. I was over there.
Ques. Where is that, at his mother's?
Ans. Yes, sir.
Ques. How close to where the shooting happened?
Ans. Well, a good ways.
Ques. How soon after the shooting did you see Marcellus?
Ans. I don't remember seeing him.
Ques. You don't remember seeing him after the shooting?
Ans. No, sir.
Ques. He wasn't there when you got back there?
Ans. No, sir.
Ques. You and this Ezella Thomas left his mother's house and went back down to Camile's?
Ans. Yes, sir, we went back to Camile's.
Ques. What caused you to go back to Camile's?
Ans. What caused me to go back there?
Ques. Yes.
207 Ans. Well, after Izelle and I got there, we heard somebody hollering and there was nobody in the house but me and her, and I asked her to go along back; she said she didn't know anything about what it was, and we got scared and went down to Camile's.
Ques. You heard hollering out there; was that Mr. Blair lying out there hollering, or somebody that wanted help?
Ans. I didn't know who it was, but somebody was out there.
Ques. How long did you stay at Camile's after you got back down there?
Ans. I don't know.
Ques. Well, did you find James Jones when you got back?
Ans. No sir.
Ques. You cut him out of his girl and went off with her, and he wasn't there when you got back?
Ans. Yes sir.
Ques. Did you go back there to old Mrs. Thomas' that night?
Ans. Yes sir, we went there and stayed all night.
Ques. Who went?
Ans. Me and Izella.
Ques. Who else?
Ans. Ann Thomas.

Further direct examination:

Ques. Do you know where Ann Thomas is now?
Ans. At Clinton.

JEFF WILLIAMS, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Is your name Jeff Williams?
Ans. Yes sir.
Ques. Jeff, where do you live?

Ans. I live at Spring.
Ques. Do you know Marcellus Thomas?
Ans. Yes sir.
Ques. Do you know of the shooting up there when Mr. Blair and Mr. Shropshire were shot?
Ans. Yes sir, I heard of it.
Ques. Did you see Marcellus Thomas upon that night?
Ans. Yes sir, I did.
Ques. Where did you see him; what time of day was it?
Ans. I seen him standing by my door.
Ques. Where was that?
Ans. That was in Spring.
Ques. Right in town or out of town?
Ans. In town.
Ques. What time in the evening?
Ans. About dark.
Ques. Who was with you when you saw him and talked with him?
Ans. Camile Thomas.
208 Ques. Anybody else?
Ans. No sir.
Ques. Did you know where Elijah Robbins lived at that time?
Ans. Yes sir.
Ques. Where did he live?
Ans. He lived at Spring.
Ques. In town or out of town?
Ans. In town.
Ques. Did you see him right near his house?
Ans. Yes sir, right there in front of his house.
Ques. Where was it you had this conversation with him with reference to Elijah Robbins' house?
Ans. He was standing in front of Mrs. Tolman's between Mrs. Tolman and Elijah Robbins.
Ques. How far is that from Elijah Robbins' house?
Ans. Well, it was about 20 steps.
Ques. Did you see Mr. Blair and Mr. Shropshire up there?
Ans. No sir.
Ques. What time did you say you saw Marcellus?
Ans. About 6 o'clock.
Ques. Did you see him when you left there?
Ans. Yes sir.
Ques. What time was it when he left?
Ans. Well, before he left we stood there and talked a while, and I told him to go around to old man John Bird's and get a wedge I had left him have; that I had loaned him; and he said all right.
Ques. Where did Bird live?
Ans. He lived about two miles from Spring.
Ques. Which way from Marcellus Thomas?
Ans. He lived northwest.
Ques. How far from Marcellus' house?
Ans. About a mile.
Ques. Whose wedge was it he left to go after?

Ans. Mine.
Ques. Who had it?
Ans. Old man John Bird.

Cross-examination:

Ques. What is your name?
Ans. Jeff Williams.
Ques. Who is that fellow Robbins?
Ans. He is a colored man.
Ques. How long had he been there?
Ans. I don't know, he had been there a couple of months I guess.
Ques. He was there long before the 12th of this month wasn't he?
Ans. Yes sir.
Ques. Who lived there with Robbins at the time he lived at Spring?
Ans. Him and his wife.
Ques. Him and his wife lived there right in Spring?
Ans. Yes sir.
Ques. Right in Spring; he didn't live anywhere near it—up near it?

209 (Objected to by defendant's counsel as immaterial and irrelevant.)

Ques. How long have you lived there?
Ans. I have been living there about four years.
Ques. What was you doing up there?
Ans. Working for my brother.
Ques. Didn't Robbins live between the town of Spring and where Marcellus lived?
Ans. Yes sir.
Ques. How far out of Spring?
Ans. He lived right there in Spring.
Ques. He lived in Spring, he didn't live between Spring and Marcellus'?
Ans. Yes sir, he lived between Spring and Marcellus'.
Ques. Did he live in the town of Spring or not?
Ans. He lived in town, that is, he lived in the edge of the town.
Ques. Did you see Blair and Shropshire while you was talking with Marcellus and Robbins?
Ans. No sir.
Ques. Marcellus left before you left, did he?
Ans. No sir, we all met in the road as I turned to go home, and I went on home.
Ques. Did Marcellus have his shot gun with him at that time?
Ans. No sir, he didn't have any gun.
Ques. You say Marcellus then left and the last you saw of him he left Spring going in the direction of home?
Ans. Yes sir.
Ques. What time was that, Jeff?
Ans. Well, about six o'clock.
Ques. When did you next see Marcellus?

Ans. I never saw him any more.
Ques. You see him now, don't you?
Ans. Yes.
Ques. You never saw him except under arrest?
Ans. No sir.
Ques. He is under arrest now and on trial, you didn't see him about the country any more?
Ans. No sir.
Ques. Not since you saw him that night?
Ans. No sir.
Ques. Did John Bird live anywhere near Marcellus' house?
Ans. He lived about a mile from Marcellus' house.
Ques. In what direction?
Ans. Northwest.
Ques. Northwest from Marcellus' house?
Ans. Yes sir.
Ques. This is Lindsley's house; there is the culvert south of Camile Thomas' house; there is Camile's house; up here is Marcellus' house; up here is where John Brady lived; now where did John Bird live?
Ans. John Bird lives right up this way.
210 Ques. Do you know where the Bruce field is out there?
Ans. Yes sir.
Ques. Which way does he live from Bruce's field?
Ans. He lived right in this direction.
Ques. Which side of the road that goes up by Marcellus Thomas' house; did Bird live on the right hand side or left hand side?
Ans. He lived on the left hand side.
Ques. That is as you go towards Wilburton?
Ans. Yes sir.
Ques. He lives due north of where the Bruce field is?
Ans. He lives northwest.
Ques. As you go north, northeast would be to your right and northwest would be to your left?
Ans. Yes sir, as you go north, he is on the left.
Ques. He lived out north and west of where that Bruce field is?
Ans. Yes sir.
Ques. You know where they said they found Blair when he was shot, don't you?
Ans. Yes sir.
Ques. Now he was said to have been found at the corner of this Bruce field?
Ans. Yes sir.
Ques. Now, Bird lives on north of that?
Ans. Yes sir.
Ques. He lives north and west of that?
Ans. Yes sir.

JAMES JONES, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Is your name James Jones?
Ans. Yes sir.
Ques. Where do you live?
Ans. I live at Westfield.
Ques. Were you up in the neighborhood of Spring at the time of the killing of Mr. Blair and Mr. Shropshire?
Ans. Yes sir I was there that same night.
Ques. Did you see those men to know them?
Ans. No sir, I didn't know them.
Ques. Did you know the men, Blair and Shropshire, at all?
Ans. No sir.
Ques. Did you see the men that were killed that night?
Ans. Well, I don't know—I didn't know them then as the same men, but I met them that night.
Ques. Where did you meet them?
Ans. I met them north of Marcellus Thomas' house.
Ques. How far north?
Ans. Well, about 100 yards.
211 Ques. What time in the day was it?
Ans. It was about dark.
Ques. Which way were they going?
Ans. They were going north.
Ques. Which way were you going?
Ans. I was going south.
Ques. Who was you with?
Ans. I was with Izelle Thomas.
Ques. Did you see Marcellus Thomas that evening?
Ans. Yes, sir, I met him just as I was going up to his brother's.
Ques. When was that, before or after you saw these men?
Ans. That was afterwards.
Ques. How long afterwards?
Ans. Well, about 20 minutes.
Ques. Where was Marcellus when you saw him?
Ans. He was at his brother's.
Ques. Camile's house?
Ans. Yes, sir.
Ques. Did you hear any shots fired that night?
Ans. Yes, sir.
Ques. Where were you when the shots were fired?
Ans. I was at Camile's sitting on the gallery.
Ques. How long was it after you saw the men before you heard the shots fired?
Ans. Well, I think that was about 30 minutes.
Ques. Had you seen any other men going up that road?
Ans. No, sir.
Ques. Before you met Marcellus?
Ans. No, sir.
Ques. Had you seen any others after you saw him before you say you heard the shots fired, pass Camile's house?

Answer. No, sir.

Ques. Which way was Marcellus going, if he was going at all, when you saw him last?

Ans. He was going north.

Ques. Towards his own home?

Ans. Yes, sir.

Ques. Do you know how far it is over to his house from Camile's?

Ans. No, sir, not exactly, but not very far.

Cross-examination:

Ques. What is your name?

Ans. James Jones.

Ques. You were down in the country—brush-cracking around with a girl named Ella Bird, were you?

Ans. No, sir, Izelle.

Ques. What is her other name?

Ans. Iselle Thomas.

Ques. You are a brother in law to Marcellus, are you?

Ans. No, sir.

Ques. You and Izelle are not married?

Ans. No, sir.

Ques. You are single?

Ans. Yes, sir.

Ques. What time did you leave his mother's house that evening with Izelle?

Ans. I don't know exactly what time it was; I know we left there about dusk.

212 Ques. Well, you and Izelle were together?

Ans. Yes, sir.

Ques. Who did you leave at his mother's house when you left there?

Ans. Nobody at all.

Ques. Where was it you met these men you saw on the road?

Ans. I met them north of the house.

Ques. In the road that leads to Wilburton?

Ans. Yes, sir, going down towards——

Ques. Well, it leads up in the direction of Wilburton?

Ans. Yes, sir, it leads north.

Ques. Which side of the road were you and Izelle on—were you in the road?

Ans. Yes, sir, we were in the road.

Ques. Did you get out of the road to let them pass?

Ans. Yes, sir, we started to get out of the road when one of them turned out and went out to the side of the road.

Ques. Which one turned out, the man on the big horse or the man on the little one?

Ans. I don't know, sir, I only know that one of them turned out to one side of the road.

Ques. You didn't have to get out of the road at all?

Ans. No, sir.

Ques. How far were you where you saw those two men, up to Camile's?
Ans. I don't know just how far, but some 500 to 600 yards.
Ques. How long did it take you and that girl to get down there?
Ans. Well, it took us about 20 minutes.
Ques. You must have been traveling at a snail's gait?
Ans. Yes, sir, we walked slow.
Ques. Did you stop on the road?
Ans. No, sir, we didn't stop.
Ques. You just walked slow?
Ans. Yes, sir.
Ques. Now, when you got down to Camile's, did you see Marcellus?
Ans. Yes, sir, I seen him just coming away.
Ques. Was he on his horse when you first saw him, or was he just getting on?
Ans. Yes, sir, he was on his horse.
Ques. He was on his horse; you didn't see him get on his horse?
Ans. No, sir.
Ques. How far from Camile's did you and Izelle meet Marcellus?
Ans. I don't know, not very far.
Ques. About how far; how many steps?
Ans. Well, about 20 steps.
Ques. Did you speak to him?
Ans. Yes, sir.
213 Ques. You both spoke to him, you and her?
Ans. Yes sir, we did.
Ques. Did he have a shot gun, then?
Ans. Not that I seen.
Ques. You didn't see any?
Ans. No sir.
Ques. Was it light enough for you to have seen it?
Ans. Yes sir, it was light enough, but I didn't see it.
Ques. You could have seen the shot gun, if he had had it—a good big thing like that, on horseback?
Ans. Yes sir.
Ques. Well, did he have a shot gun with him then?
Ans. Not that I know of.
Ques. Well, now, Jim, when you got into the house, who was in there—Camile's house?
Ans. Why, Ann Thomas, and Ella Baldwin.
Ques. What did you do after you got in there?
Ans. Well, I didn't do anything, I just went upon the gallery.
Ques. Where were those girls?
Ans. They were there.
Ques. Were they sitting up or lying down?
Ans. They were sitting on the gallery.
Ques. What became of you and those girls—how long did you stay there?
Ans. I didn't stay there very long.
Ques. What did you do with the girl you took down there?

Ans. I left here there.
Ques. Where did you go?
Ans. I went back home; started back to Spring.
Ques. You went on back to Spring?
Ans. Yes sir.
Ques. Where were Izelle and this other girl Ella Baldwin, were they still at Camile's when the shot was fired that you heard?
Ans. When I left, they came back to their mother's.
Ques. Well, you said you left them all there at the house; you heard the shot there when at Camile's house?
Ans. That is right.
Ans. How came they to go back at their mother's?
Ans. Well, when I went on to Spring and left them at Camile's, they left afterwards and came on up to their mother's.
Ques. The point is—I asked you where those girls were when you left and you said you left them there and you went on to Spring. Now you turn around and say you saw those girls up at old lady Thomas' when the shots were fired?
Ans. No sir, they were not down there when the shots were fired.
214 Ques. They were not down where?
Ans. Down at the old lady's.
Ques. Where were they?
Ans. They were there at Camile's; afterwards they went up to the old lady's.
Ques. They were at Camile's when the shots were fired?
Ans. Yes sir.
Ques. They were not at the old lady's when the shots were fired?
Ans. No sir.
Ques. You don't know who those men were that passed you along there?
Ans. No sir.
Ques. You don't know how many men passed along there while you was in that vicinity?
Ans. No sir.
Ques. You wasn't watching them?
Ans. No sir.
Ques. You had your eye more on those girls than on men riding around up in that country?
Ans. Yes sir.
Ques. Were those men riding slow or fast?
Ans. They were riding slow, talking.
Ques. Just slowly riding along?
Ans. Yes sir.
Ques. One of them was polite enough to turn out of the way for you and this girl to pass in the road?
Ans. Yes sir.
Ques. Which side was that on?
Ans. That was on this side going south.
Ques. You say you were going south, on the right hand side or left hand side of the road?

Ans. On the right hand side.
Ques. The man on the right hand side turned out around you?
Ans. Yes sir.
Ques. That would be the man on the left hand side going out?
Ans. Yes sir.

ED ROLAND, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Ed, where do you live?
Ans. I live in Spring.
Ques. Do you know Marcellus Thomas?
Ans. Yes sir?
Ques. Do you know where he lives?
Ans. Yes sir.
Ques. How far do you live from Marcellus?
Ans. Well, I could not say exactly.
Ques. Well, about how far?
Ans. I guess it is about 200 or 300 yards.
Ques. How far does Marcellus live from Camile Thomas?
Ans. Well, I don't know exactly how far it is, but I guess the distance would be something like 200 yards.
Ques. How far is it from Camile's to Geo. Lindsley's?
Ans. I would judge it to be nearly a quarter of a mile.
215 Ques. Are you on the same road—live on the same road that Camile, Lindsley and Marcellus live on?
Ans. No sir, the road I live on don't come around that way; the road from Spring leads down to the county road; I live on the right hand side of that road known as the county road, the main county road, the Montgomery road.
Ques. Did you know Mr. Blair and Mr. Shropshire who were killed out there about the 9th of October last?
Ans. No sir. I never saw them at all in my life.
Ques. Who was the first man to get to Mr. Blair, if you know?
Ques. Why, if anybody else had been there before I arrived, I don't know anything about it.
Ques. You went to him, did you?
Ans. Yes sir, I did.
Ques. Where did you find him, and how did you come to go to him?
Ans. Why, how I come to go to him was because just before going to bed I heard him hollering down there; and of course he was hollering like somebody in distress, I listened at the distress cry I guess until he hollered 3, 4 or 5 times; then after I listened at the distress, I called my wife and made her get up, and she said What is the matter? What do you want to do? I said I wanted to go down there and see what is the matter, there is a fellow hollering down there like he is in distress.
Ques. State what you did?
Ans. I taken my coat and hat and goes down to the corner of my fence. When I got probably 300 yards from my house I calls to Mr. Blair over my fence. At that time I didn't know whether

it was Mr. Blair or who it was; I called to him. I said What is the matter, friend? I first asked who was there, and he didn't say anything. I saw the man wasn't able to help himself, and I says What is the matter? and he says I am sick. When I gets over the fence and goes to him and asked him what was the matter again, well, he said My hand hurts me. I never examined it — all, because there was a horse there at a short distance from Mr. Blair, and when he said his hand hurt him, of course, a man wounded that way and shot there, a man will show more or less fright, but I saw that his fingers were useless. I said Well, I will go for a doctor for
216 you; shall I go for a doctor for you? and he says Yes. I said shall I ride this horse? and he said yes, so I mounted the horse and rode towards town.

Ques. Now, when you got to him, what, if anything, did you see there near him or by him?

Ans. Well, if I saw anything, I saw two bottles, one on each side of him, that is all.

Ques. How far was this horse from where he was lying?

Ans. I don't think over 10 or 15 feet.

Ques. Was the horse loose or fastened?

Ans. No sir, the horse wasn't fastened; that is, he wasn't fastened but a little; there was a rope tied around the horse's neck, a very small rope, not very long, just about as long as from here to that jury; the rope was wrapped around a barbed wire that runs on the outside of my fence to keep the cattle out; that rope wasn't tied, it was just wrapped around the barbed wire, that is all.

Ques. Did the horse have a saddle on it?

Ans. Yes sir.

Ques. What kind of a horse was it, a large or small?

Ans. Well, It wasn't a very large horse.

Ques. Did you see Mr. Shropshire that night?

Ans. Yes sir.

Ques. Where did you meet him?

Ans. I met him right opposite Geo. Lindsley's.

Ques. What, if anything, was said then about the horse you was riding?

Ans. Why, I called to Geo. Lindsley and asked him what was the matter, and he said a man was shot there—— (Objected to——) Why, Mr. Shropshire replied to me that I was riding his horse; that the large horse was Mr. Blair's, that is all.

Ques. Did you do anything further about it?

Ans. No sir.

Ques. You then went on for the doctor?

Ans. No sir, I didn't go for the Doctor.

Ques. Why not?

Ans. Because Mr. Lindsley notified me that the Doctor had already been there, and I was to go after Mr. Townsend.

Ques. Did you go after Mr. Townsend?

Ans. No sir, I did not. I met Mr. Townsend, I guess some 300 to 400 yards up the road coming.

Ques. There wasn't any necessity then of going for him?

Ans. No sir.

Ques. Now, how far was Blair from the Wilburton road?

Ans. How far was he from the Wilburton road?

Ques. Yes sir, from the road.

Ans. Well, I don't know any Wilburton road.

217 Ques. Ain't there a traveled road to Wilburton from Spring?

Ans. Yes sir, that is the county road, I am answering for the county road, I could not answer for the Wilburton road, I guess the distance, if you go a straight course on the county road, wouldn't be over 300 yards, but the road does not go that way, it goes farther down for a mile.

Ques. From where Blair was found, how far was that from the road?

Ans. Well, a straight course to the road there would be some 300 to 400 yards.

Ques. West or east?

Ans. Well, that would be west.

Ques. How far is it from that point directly west of where Blair was found on what you call the county road, down to Marcellus' house?

Ans. You mean the county road; that road don't lead to Marcellus' house; Marcellus Thomas' house is above the county road; that is above where Mr. Blair was.

Ques. Is there two roads down there?

Ans. Yes sir.

Ques. Either road then, how far is it from either road, the one that runs near Marcellus Thomas' house; how far does he live down towards Spring, from where Blair was found?

Ans. Well, I don't know, I could not tell exactly.

Ques. State as near as you can?

Ans. Well, I guess 400 to 500 yards.

Ques. How far is it from the road that goes past Marcellus' house out to where Blair was found?

Ans. Well, it was not very far. The distance I guess of about 35 yards; probably not so many, from the road.

Ques. How long have you known Marcellus?

Ans. I guess it must be a year, or probably a little longer.

Ques. You were living in the same community with him at that time?

Ans. Yes sir.

Ques. Do you know his reputation in the community with reference to being a quiet, peaceable, law-abiding citizen?

Ans. I never——

Ques. Do you know his reputation—general reputation?

Ans. I never have heard him talked about.

Ques. You never have heard anything about it.

Ans. No sir, I never have heard anything about it.

218 Ques. How well could you fix the time of night you heard this cry of distress out there, when you went out?

Ans. The first cry.

Ques. Yes sir?

Ans. Well, I could hardly fix that time exactly.

Ques. Do you know how long Mr. Blair had been there before you heard him?

Ans. No sir.

Ques. Did you hear the shots?

Ans. I did.

Ques. How long, about, after you heard the shots, was it before you went out to where Blair was?

Ans. Well, of course I am not attempting to give it exactly, I guess it was about seven o'clock when the shots were fired. I am satisfied it was a little after seven, because I had returned from my work, and had been at home some time when I heard the shots.

Ques. Well, about how long?

Ans. How long before I went out there?

Ques. I want to know about how long was it between the firing of the shots, the same shots you heard and when you went out to where Blair was found shot and down?

Ans. I guess it must have been three quarters of an hour or more.

Ques. You were about to go to bed, you stated, at the time?

Ans. Yes sir.

Ques. You went out and found him out there?

Ans. I did.

Ques. Now, did Mr. Shropshire tell you how his horse happened to be over by Mr. Blair?

Ans. No sir.

Ques. I will ask you if he did not tell you himself, though wounded as he was, went over there and tried to help Blair and found that he could not and that he left his horse there and had walked back towards the road, that he could not get on his horse on account of his wounded arm, and there was something wrong with the girth of the saddle?

Ans. Well, the girth of the saddle was loose.

Ques. Did Mr. Shropshire tell you that when the shot was fired, that his horse jumped and loosened the saddle girth?

Ans. No sir.

Ques. And that after he fell off his horse he afterwards tried to get on and could not on account of his wounded arm, and on account of the girth loose, and he could not fasten it with one hand?

Ans. No sir, he didn't tell me that.

Ques. Did he tell you that he walked out there to where
219 Blair was himself, and tried to help Blair, and decided he could not, and that he could not get on his horse, and he left his horse near Blair and walked back and tried to get help?

Ans. No sir, he didn't tell me that.

Ques. You say you found two bottles up there?

Ans. Yes sir lying there.

Ques. Were they empty or loaded?

Ans. I don't know, I never examined them at all.

Ques. How far did Blair live from that point, do you know?

Ans. No sir, I don't know.

Ques. You live on the Bruce place?
Ans. Yes sir.
Ques. How far was your house from the corner of that field out there, near which Blair had fallen?
Ans. I guess from my house to the corner out where I found him,—well, something near 600 yards—I am satisfied it was that far any how.
Ques. Now, this horse you rode, you say you unfastened the rope without any trouble?
Ans. Yes sir, the rope was wrapped around a barbed wire, I suppose it had caught around the barbed wire.
Ques. At any rate, it wasn't tied?
Ans. No sir, it wasn't tied.
Ques. Where did you find Mr. Shropshire when you got up there where he was?
Ans. Near Lindsley'- house and opposite Lindsley's house.
Ques. Was he sitting up or lying down?
Ans. He was sitting up when I found him.
Ques. When you went to where Blair was lying there, did you try to help him up?
Ans. No sir, I didn't try it.
Ques. When Mr. Blair said his hand was hurting him, and you looked at it did you know at the time that he was also shot in the body?
Ans. No sir, I didn't have any knowledge how he was shot.

GEO. GAEDKE, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. You- name is Geo. Gaedke?
Ans, Yes sir.
Ques. Where do you live?
Ans. At Spring Station.
Ques. What business are you engaged in?
Ans. Grocery business.
Ques. You handle beer with groceries also?
Ans. Yes sir.
220 Ques. Did you know John Blair and Ben Shropshire in their life time?
Ans. Yes sir.
Ques. Did you see them on the night of October last before they were shot?
Ans. Yes sir, I did. I won't be certain whether it was the 9th of October or not.
Ques. But it was the same day they were shot?
Ans. Yes sir.
Ques. What time in the day did you see them first?
Ans. I seen them about 7 o'clock.
Ques. Did you see them after that.
Ans. Yes sir.
Ques. How late in the day did you see them?
Ans. At about six o'clock or probably a little after.

Ques. How often did you see them during the day?
Ans. Well, all day you might say.
Ques. Were they at your place?
Ans. Yes sir.
Ques. How frequently?
Ans. Well, they were in and out all the time—about all the time ere.
Ques. What were they doing?
Ans. Trading and talking.
Ques. What else?
Ans. Drinking beer.
Ques. How long had they been drinking beer when they left?
Ans. Before they left my place?
Ques. Yes sir.
Ans. Well, I could not say how long they had been there; they ne in off and on.
Ques. Do you know when they started home, about what time?
Ans. Well, they started a little after six o'clock.
Ques. Did you see them when they started?
Ans. Yes sir.
Ques. Did you sell them anything to take with them?
Ans. Yes sir.
Ques. What was it?
Ans. Some bottled beer two pairs of boots and two pair of jumpers.
Ques. Anything else?
Ans. No sir.
Ques. What did you sell, I mean to either one of them?
Ans. Well, I sold Mr. Shropshire a pair of boots; I sold them four les of beer.
Ques. Were those bottles of beer taken with them when they left?
ns. Yes sir.
ues. They started with them home?
Ans. Yes sir.
Ques. They left about six o'clock?
Ans. Yes sir.
ues. Did you see Marcellus Thomas there?
ns. No sir.

Cross-examination:

ues. You keep a general store there, don't you?
ns. Yes sir.
ues. Those men were there in your store and occasionally drank ss of beer?
ns. Yes sir.
ues. Did you see any arms about either one of them?
ns. No sir, I saw no arms, except, Shropshire had a little barlow with the spring broken; he took it out of his pocket. I showed my knife and Mr. Shropshire pulled out his knife and said that I have to carry.
ues. It was a broken spring barlow knife?
ns. Yes sir.

(Counsel for both sides agreed that a juror could ask a question, the juror having asked to do so.)

Juror J. H. ROCKWELL: I would like to know whether or not those men were intoxicated drinking beer. To Witness: Were they intoxicated when they left your place?

WITNESS: No sir, they were not.

FREEMAN SCOTT (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Your name is Freeman Scott?
Ans. Yes sir.
Ques. Where do you live Freeman?
Ans. At Westfield, Texas.
Ques. What is your business?
Ans. I am a section foreman.
Ques. How long have you been section foreman?
Ans. Since the first of March.
Ques. Were you there at the time Marcellus Thomas was arrested?
Ans. Yes sir.
Ques. Was you present when the officers arrested him?
Ans. Yes sir.
Ques. Did you hear a statement made by him to the officers with reference to the shooting?
Ans. Yes sir.
Ques. State to the jury just what he said, how he came to be there, and how it came up.

(Objected to by the State's counsel as a self-serving declaration. Objection overruled.)

Ques. Were you in the room and heard the statement made by him to the officers?
Ans. Yes sir.
Ques. State what it was he said?
222 Ans. He said that he had started down to John Bird- to get a wedge that night, and was riding out in the road and that he met those fellows, and they were meddling with him, and asked him who he was, and he told them Marcellus; then one of them asked him again and he told him Marcellus, and he says you are not Dr. Sellers, Dr. Sellers is a white man and you are a nigger. Do you see this 45? And he says yes, and at that time he tried to get out of their way, and he said they took after him and run him on their horses and run him about 300 yards, and he ran his horse out in the timber and got away from them, and that he stayed out there twenty five or thirty minutes, until he thought they had gone, and he would go on his way, and he rode out to the road again and came in contact with these fellows again; that is where the shooting commenced.
Ques. What if anything, did he say they did when he came out in the road again?

Ans. He said one of them jumped off his horse and came at him and the other one grabbed his bridle reins.

Cross-examination:

Ques. What is your name?
Ans. Freeman Scott.
Ques. What relation are you to Marcellus Thomas?
Ans. I married his cousin.
Ques. He came down to you, after he had shot these men, and you had him there at your place?
Ans. Yes sir.
Ques. What kind of a horse was he riding?
Ans. A bay horse.
Ques. Large or small?
Ans. Well, a pretty good size horse.
Ques. Was that the horse he rode away?
Ans. Yes sir.
Ques. What time of night did he get to your place?
Ans. I don't know the exact time, but it was between 8 and 9 o'clock I suppose.
Ques. Well, he put up his horse and went to bed, did he?
Ans. Yes sir.
Ques. You were already a sleep at that time, were you?
Ans. Yes sir.
Ques. How far is Westfield from Spring?
Ans. They call it 4 miles.
Ques. He lived a mile or more north of Spring?
Ans. Yes sir.
Ques. Then, he was at your house, a distance of about five miles, between 8 and 9 o'clock?
Ans. Yes sir.
Ques. Did he bring his shot gun with him?
Ans. Yes sir.
Ques. Where did he tell you he went and got his shot gun?
Ans. He said he left his brother Camile's without the shot gun and rode up the road.
223 Ques. Where did he tell you he got his shot gun?
Ans. He didn't say.
Ques. He didn't tell you anything about that?
Ans. No sir.
Ques. He said he went out in the woods and stayed about 25 minutes and came out to the road and came in contact with those men, and then is when he shot them?
Ans. Yes sir.

JOHN BIRD (colored), called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Is your name John Bird?
Ans. Yes sir.
Ques. John, where do you live?
Ans. I live about a mile of Spring.

Ques. Which direction do you live from Spring?
Ans. Sort of Northwest.
Ques. How far do you live from Marcellus Thomas?
Ans. About half mile.
Ques. Which direction?
Ans. Right northeast or northwest course.
Ques. Northwest course?
Ans. Yes sir, northwest course.
Ques. From Marcellus Thomas?
Ans. Yes sir.
Ques. Do you know Marcellus Thomas?
Ans. Yes sir.
Ques. Did you live there on the 9th of October last?
Ans. Yes sir.
Ques. Do you remember the time of the shooting up there?
Ans. Yes sir.
Ques. Well, at that time did you have a wedge at your place belonging to Jeff Williams?
Ans. I did.
Ques. How long have you known Marcellus Thomas?
Ans. I have known him since he was a small boy.
Ques. How long have you lived near him?
Ans. Well, about six years I have lived right there at him.
Ques. Do you know his general reputation in the community in which he lives for being a quiet, peaceable, law-abidding citizen?
Ans. Yes sir.
Ques. What is it, good or bad?
Ans. He has got a very good reputation.

Cross-examination:

Ques. What is your name?
Ans. John Bird.
Ques. You say you are the man that had the wedge?
Ans. Yes sir, I had the wedge at my house.
Ques. How did it get at your house?
Ans. I carried it there.
Ques. How long had you had it?
Ans. I had had it 3 or 4 months.
Ques. What had you been doing with it?
Ans. Splitting wood.
224 Ques. One of these wedges you split rails and wood with, and things of that kind?
Ans. Yes sir.
Ques. Had you seen Marcellus Thomas the day of the killing of those two men?
Ans. Yes sir, I seen him that evening about 3 o'clock.
Ques. Where did you see him?
Ans. He was clean down in the woods around from across the creek.
Ques. He was going from across the creek, about three o'clock?
Ans. Yes sir, about three o'clock.

Ques. Which direction was he going, towards Spring, or away from it?

Ans. Going right north.

Ques. How far from your house at that time?

Ans. From my house at which time?

Ques. How far was you from home, were you?

Ans. I wasn't at my home.

Ques. I asked you how far from your house it was you saw him. You said you saw him about three o'clock going north?

Ans. Yes sir.

Ques. Did he tell you where he was going?

Ans. Yes sir.

Ques. Where did he tell you he was going?

Ans. He said he was going to see a fellow that was getting out a lot of logs and wood, to try to get a job.

Ques. How far was that from where you saw him?

Ans. Well, about two miles.

Ques. How far was he from your house when you saw him going north about three o'clock?

Ans. About a mile and a half.

Ques. About a mile and a half from your house?

Ans. Yes sir.

Ques. That was two miles still beyond you, and about three miles from where you lived?

Ans. Yes sir.

Ques. How far when he got three miles up there, would he be from Spring?

Ans. Well, according to the way he was going——

Ques. Well, it would be about six miles from Spring?

Ans. No sir.

Ques. You said he was going north?

Ans. Yes sir, but it was only three miles from Spring to Hardin.

Ques. He had to go three miles to get to Hardin?

Ans. Yes sir.

Ques. You saw him about three o'clock?

Ans. Yes sir.

Ques. How was he traveling?

Ans. Riding a horse.

Ques. How was you traveling?

Ans. I wasn't traveling at all, I was in the woods; he came by where I was.

225 Ques. He came by on a horse?

Ans. Yes sir.

Ques. Was you using the wedge at that time?

Ans. No sir, I wasn't using the wedge, the wedge was at my house.

Ques. You had been using it every day?

Ans. Yes sir, I had been, I only used it when I split wood; I was cutting cord wood that day.

Ques. He could have got that wedge when he came back by going back to the house?

Ans. Yes sir.

Ques. Did you see him any more after that?

Ans. No sir, I never seen him any more until I saw him here.

Ques. Now, John, didn't he come to your house that night?

Ans. No sir, I wasn't at home, I was out calling cattle, I wasn't at home, but my wife was.

Ques. You never did meet him after that?

Ans. No sir, he never came to my house.

Ques. You didn't meet him after the killing of these men?

Ans. No sir, I never seen him any more from that day until I seen him here today.

Ques. Where did you say you lived at that time?

Ans. I lived a half mile from his house.

Ques. Do you know where that Bruce field is?

Ans. Yes sir.

Ques. Which way do you live from the Bruce field?

Ans. I live northwest from it.

Ques. How far from the Bruce field?

Ans. Well, just about half way; my house is a little bit farther, because I live on one side of the field and he lived on the other side, I lived on the lower end and he lived on the upper end.

Ques. You lived on one side of the Bruce field and he on the other?

Ans. Yes sir, we lived on one side and he lived on the other side.

Ques. That field don't go any where from that road there. Now, this is his house, right here; down here is where Camile lives; up here is the Bruce field; the Bruce field is northwest from where you live and on the other side of the road?

Ans. Yes sir.

Ques. Well, then, you don't live on one side of the road and he on the other?

Ans. No sir, I live right that way.

226 Ques. You live about half a mile from that Bruce field, don't you John?

Ans. Yes sir, about a half mile.

Ques. Then to go from his house to your house, the nearest way for him to go, would be to cut across the prairie?

Ans. Yes sir.

Ques. And go by the corner of that Bruce field?

Ans. Yes sir.

Ques. He would not need to be along that road?

Ans. No sir.

Ques. The nearest way to go from his house would be to go up north to that little lane go through and cross and go up the road by Bruce's field and on up to your house?

Ans. Yes sir.

Ques. That is the nearest way?

Ans. Yes sir.

Ques. You didn't see him that night at all?

Ans. No sir, I never seen him that night at all.

Ques. What did you tell him about the wedge that afternoon?

Ans. I told him the wedge was at my house.

Ques. Did he tell you that Jeff had told him to get the wedge?
Ans. Yes sir.
Ques. When did he tell you that Jeff told him to get the wedge?
Ans. He didn't tell me when Jeff told him to get the wedge.
Ques. Then, if Jeff didn't tell him to get the wedge until six o'clock that evening down near Mrs. Tolman's house, he must have been kind of storying to you at that time?
Ans. Well, I don't know about that. He asked me about the wedge and I told him to go and get the wedge.
Ques. If, in fact, Uncle John, when Jeff told him to get the wedge, was at six o'clock that evening, that was after you saw him that afternoon at three o'clock, and it was then he told you that Jeff had told him to get the wedge, he must have been storying about it?
Ans. Yes sir, he came to me about three o'clock and told me that Jeff had told him to get the wedge, but I don't know what Jeff had told him.

MARCELLUS THOMAS, sworn as a witness in his own behalf, testified as follows:

Ques. Your name is Marcellus Thomas, is it?
Ans. Yes sir.
Ques. You are charged in this case with having killed John Blair, State now to the jury just all about this affair and the shooting; if you shot him, state when and how you came to do it. First, I will ask you where you were during that afternoon?
227
Ans. That afternoon I started over—That forenoon I met Mr. —— and he told me of a man who wanted some wood chopped and I could get a job from him cutting wood; I told the man I would be——
Ques. I want to know where you were that afternoon?
Ans. In the afternoon I was around home the biggest part of the day, then I went down to my brother's and I told him I was going to chop wood, and about six o'clock in the evening I started down to Uncle John Bird's to get an iron wedge. Jeff Williams had told me to go down there and get it, and I said I would before I started to work, and he said all right, and I did go to John Bird and told him I was going to get the wedge, and he said all right.
Ques. What time was that?
Ans. About six o'clock in the evening.
Ques. Where did you go then?
Ans. Well, I went on down to my brother's and helped my sister in law drive some horses away; I stayed there a while and then left there.
Ques. Before you left there, had you seen Mr. Blair and Shropshire; I mean before you left that time?
Ans. No sir.
Ques. Then, where did you go when you left Camile's?
Ans. I went on home.

Ques. Which way did you go?

Ans. North.

Ques. You went right past this Bird house, did you?

Ans. Yes sir, I went right on the road going between my house and Camile's and right on in front of my house and goes down by John Bird's near the old Bruce field; I went right on up that road and goes up to my gate and got off my horse and went in the house and asked my little girl where my wife was, and she said she had gone to get some water; I got my gun and got on my horse and went on——

Ques. Before you got your gun, had you seen Blair and Shropshire?

Ans. No sir, I hadn't seen them at all that day.

Ques. Did you know them at all?

Ans. No, sir.

Ques. Do you know that you had ever seen them to know them?

Ans. I knowed one of them by folks speaking of Blair; hearing folks call his name Blair, but I wouldn't know him.

Ques. When you got your gun, where did you go?

228 Ans. I started to go over to Mr. Bird's.

Ques. Which way did you go?

Ans. I started out the lane around my yard fence, and went on that way and came back in the road, and just as I got in the road I came in contact with those fellows, and one of them said "Where are you going nigger. I said I am going down the road, He says What is your name, nigger? I says Marcellus. He says Dr. Sellers, God damn your lying heart, that is not your name. Dr. Sellers is a white man and you are a damned nigger; you God damned black son of a bitch, that is not your name. I says Yes, it is. One of them says You see this .45? I says yes, the other one says Do you see this? He had something in his hand, I didn't see what it was, but I said yes. I didn't want to get into any trouble with them and started to ride off from them; one of them says "You God damned black son of a bitch, I will kill you," and they both struck at me and grabbed for me, but I broke and run my horse, and they after me and ran me up the road about 250 yards, when I turned out to the right of the road and turned into the woods; one of them followed me to the edge of the woods and then they turned back. I stayed in the woods 25 minutes or possibly longer until I thought they were gone off and had been gone long enough to pass Mr. Bird's house. Of course, I wanted to get the wedge, and I went on down to the little bend in the road and on down where the road goes straight back into that main road, and just as I got down to that point, I saw one of them tightening something about his horse; one was on his horse, and one on the ground; and just as I rode up one of them says there is the black son of a bitch now, kill him and struck at me and I dodged his lick.

Ques. Which one struck at you?

Ans. I don't know who it was.

Ques. Well, was it the one on the horse or the one on the ground?

Ans. The one on the horse struck at me; the one on the ground,

when I wheeled my horse to run from him, this man on the ground, he ran around and grabbed my horse by the bridle rein, and the one on the horse was striking at me and I just turned my gun on him and shot him, didn't know where I hit him; the man on the ground was right by the side of me like, then I just turned my gun and shot him.

229 Ques. Why did you shoot?

Ans. I was scared of them, thought they were trying to kill me.

Ques. Did you give them any occasion to assault you, in any way?

Ans. No sir, I never gave them a cross word at all.

Ques. Did you know they were there when you came back in the road until you ran right close on to them?

Ans. No sir.

Ques. How close did you get to them before you saw them?

Ans. About as close as I am to this jury. One of the men was outside of the road, he wasn't in the road, he was standing on the left hand side of the road. The one on the horse ran in behind me like and tried to head me off from getting back, and the other one ran around in front of me.

Ques. Where did you go after the shooting?

Ans. I turned right around and came back up to the house; my wife wasn't there, so I went down to my brother Camile's house, and asked him if he had seen anything of my wife, and he said no; so I goes down that road a little ways and turned off into the county road and went to Westfield.

Ques. Did you stay at Westfield that night?

Ans. Yes sir.

Ques. Why did you go down there?

Ans. Because I was afraid to stay at home.

Ques. How far did they run you that time when you started and ran?

Ans. They ran me about 250 yards.

Ques. Did they both run you?

Ans. Yes sir.

Ques. How close were they to you when you turned out in the woods?

Ans. One of them was cutting at me when I turned out in the woods, and I didn't know but he was following me, until I had got out in there some ways.

Ques. You had not seen them before that since you started from home?

Ans. No sir.

Ques. Did you have any chance to get away when you came up to them the second time when you got back in the road before the shooting?

Ans. No sir.

Ques. Did you see anything in their hands when they came at you, after you got back in the road?

230 Ans. Yes sir, one of them had something in his hand, the one that grabbed at my horse had something in his hand.

Ques. Which hand?

Ans. He had it in his left hand.

Ques. Which hand did he catch hold of your horse's rein with?

Ans. The way he was standing he caught hold of my horse with his right hand.

Ques. Just state why you shot?

Ans. Why, I was scared of them, I knew they had me, I could not get away from them.

Ques. Scared of what, do you mean?

Ans. I knowed they were trying to kill me, and I know they had me where I could not get away from them.

Ques. You made a statement to Mr. Townsend when he came down there the next day, didn't you.

Ans. Yes sir.

Ques. What time did he come there?

Ans. He came about day light.

Ques. Where were you when he came?

Ans. I was laying in bed.

Ques. Who was in there when he came?

Ans. Mr. Freeman Scott.

Ques. What did he say to you and what did you say to him?

Ans. He came in there and said Hello, Marcellus, is that you? I said yes. He said well you killed some men up here last night, and I want you to tell me how it occurred, and I went on and told him how it occurred.

Ques. Did he give you warning about anything you said to him?

Ans. No sir, he never did.

Ques. He never said anything to you about that?

Ans. No sir, he told me what he came down there for.

Ques. Did he tell you anything about that gun?

Ans. Yes sir, he said wait until I get that gun, and then come on with me.

Ques. What did you tell him about how it happened?

Ans. He just asked me how it happened and I told him I was going down to Mr. Bird's after the wedge and those men got after me, and asked me my name and I told him my name, and he said it wasn't my name, it was a damned lie, and they *they* started after me and run me and I got away from them, and that when I came back to the road the fellow on the ground caught hold of my horse, and they were cutting at me, and calling me some kind of funny names.

231 I asked him if he wanted it all, and he said no he didn't want the details of it.

Ques. State whether or not you had any ill feeling towards those men prior to this occurrence?

Ans. No sir, I wasn't mad at either one of them; had not had any trouble with them, and had no dealings with them in any way.

Cross-examination:

Ques. You didn't have any ill will towards them prior to this occurrence?

Ans. No sir.

Ques. Until they used this language towards you that you have stated, you didn't have any ill-will at all?

Ans. No sir, I wasn't made at either one of them, I was scared when they got after me.

Ques. Your lawyer asked you up to that time, whether up to that time you had any ill-will towards them; you hadn't up to that time?

Ans. No sir, I wasn't mad at either one of them.

Ques. Up to that time?

Ans. No sir.

Ques. Now, where were you that afternoon?

Ans. Afternoon?

Ques. Yes sir, where did you eat dinner?

Ans. At home.

Ques. What time?

Ans. I don't know exactly what time it was.

Ques. About dinner time, about the middle of the day?

Ans. Yes sir.

Ques. Well, what did you do after you eat dinner?

Ans. I didn't do anything. I went out to see Mr. ——, he told me to come over, I will give you a job cutting wood.

Ques. Did you go over?

Ans. I started on over.

Ques. Where is this place, now?

Ans. At Hardin.

Ques. Well, did you go over there?

Ans. No sir, I didn't, I went down as far as John Bird's, where he was working, and told him I had come there to see about a wedge Jeff Williams had let him have.

Ques. Why didn't you go on over there to Hardin to see about your job, when you had got that far?

Ans. I stayed there talking with him too long. This fellow told me he was coming on the four o'clock train that evening.

Ques. Who told you that?

Ans. Mr. —— told me he was coming in on the 4 o'clock train that evening.

232 Ques. Why did you tell old man Bird that you was going over to that place and leave him and go in that direction?

Ans. I told him I was going over to look at it to see how it looked.

Ques. You said you stayed there and talked too long to go?

Ans. Yes sir.

Ques. You heard him say just a while ago that when you left him you went on in the direction of Hardin?

Ans. Yes sir, I did; I went on and met some fellows driving some cattle and I stayed there and talked with them and went with them as far as the railroad and then turned around and came back home.

Ques. You didn't go back by John Bird's?

Ans. No sir.

Ques. Why didn't you if that was on your road, why did you go away on a round about road?

Ans. No sir, I just went up there to Bird-, but it wasn't on my road to Hardin.

Ques. Why did you go up there if this fellow Jeff Williams had not told you about the wedge, that is what I am asking you?

Ans. No sir, that fellow didn't tell me John Bird had the wedge.

Ques. You heard his say so a few minutes ago?

Ans. No sir, I never told him anything about it; I knew he had the wedge; didn't say anything about Jeff Williams telling me that he had the wedge.

Ques. You say that is entirely untrue?

Ans. I am telling you the truth.

Ques. I say you heard John Bird just a few minutes ago testify that when you came up there at three o'clock in the evening that you told him that Jeff Williams had told you to get the wedge that he had down at his house?

Ans. I never told him anything about Jeff Williams telling me any such thing.

Ques. He is mistaken? is he?

Ans. If he said it, he is.

Ques. You heard him say it, didn't you?

Ans. I won't be so positive about that.

Ques. You won't swear he didn't, will you?

Ans. I won't swear he didn't, and I won't swear he did.

Ques. Now, Marcellus, what time did you get to Spring that evening?

Ans. I got there about five o'clock.

Ques. Now, ain't it a fact why you are saying you turned back that one witness has sworn that you were at Spring, and that old man Bird has sworn that you were out there where he was at work at three o'clock and that when you left him you went towards
233 Hardin, away from Spring; ain't that the reason you are swearing he is mistaken?

Ans. No sir.

Ques. What time did you get to Spring?

Ans. I got to Spring about five o'clock that evening.

Ques. What did you do there?

Ans. I met this fellow that came in upon the train.

Ques. What is his name?

Ans. I don't know, I know his partner.

Ques. White men or colored?

Ans. Both colored.

Ques. Did you have him summoned as a witness?

Ans. No sir.

Ques. Well, how long did you stay in Spring?

Ans. I stayed in Spring, up in town and at the Post Office—I stayed there 25 minutes or 30 and talked with him, and he says Well, I will give you another job of going over there and getting some hands.

Ques. Where was that, over at Hardin?

Ans. No sir, that was the place he wanted me to work at.

Ques. The place you were talking in was Spring and the job was over in Hardin?

Ans. Yes sir.

Ques. Where did you go after you left him?

Ans. I went to my brotherinlaw's.
Ques. Who is your brother-in-law?
Ans. Jeff Williams.
Ques. He is the man who owned the wedge?
Ans. Yes sir.
Ques. What time did you get to his house?
Ans. I got to his house about twenty minutes of six or something like that.
Ques. Twenty minutes of six?
Ans. Yes sir, supposed to be along there somewhere.
Ques. Did you have any conversation with Jeff Williams?
Ans. Yes sir, I spoke to him, but he wasn't at home that time. I went down the road and met him, and I told him this fellow says I can have the job of work, and he said to me to go down to old man Bird's and tell him I want him to give you my iron wedge.
Ques. Who was present at that time?
Ans. This fellow Elijah Robbins and I think Mrs. Tolman heard it.
Ques. You say that Elijah Robbins could have heard it, and either one of them right there where it occurred?
Ans. Yes sir.
Ques. Then when Jeff says Robbins wasn't right there, he is a liar or is mistaken. If Jeff tells it differently from the way you do,
234 he is mistaken, if he says Elijah Robbins was over on a gallery about twenty steps away; he was in the conversation, and not like Jeff says he was?
Ans. Yes sir.
Ques. What time was that?
Ans. Along about six o'clock.
Ques. About six o'clock in the evening?
Ans. Yes sir.
Ques. It was getting sort of dusky, wasn't it?
Ans. No sir, the sun wasn't quite down.
Ques. The sun wasn't quite down?
Ans. No sir.
Ques. How long did you stay there and talk?
Ans. I stayed there and talked about 20 minutes.
Ques. Then it was about 20 minutes after six when you left?
Ans. I suppose so.
Ques. You guess; didn't you look at your watch—did you have a watch?
Ans. No sir.
Ques. You just estimate the time the best you can?
Ans. Yes sir.
Ques. Which way did you go from there; did you stop anywhere else?
Ans. Yes sir, I went to my cousin's?
Ans. What is her name?
Ans. Ardelia Jones.
Ques. How much time did you spend with her?
Ans. I stood and talked with her a while on my horse.
Ques. How long?

Ans. I don't know what time.
Ques. Where did she live?
Ans. She lived right on the side of the road.
Ques. That road you had to go out home on?
Ans. Yes sir.
Ques. How far from Geo. Lindsley's?
Ans. Well, about 400 yards.
Ques. 400 yards south of Lindsley's?
Ans. Yes sir.
Ques. Well, did you stop any more?
Ans. No sir, I went right straight on.
Ques. How long did you talk with Ardelia?
Ans. About 2 or 3 minutes.
Ques. Anybody besides you and Ardelia there?
Ans. I never seen anybody.
Ques. She is your cousin in law, is she?
Ans. No, a cousin.
Ques. Well, when you got to Camile's, did you get down off your horse?
Ans. I got down once and straightened my saddle on my horse.
Ques. Did you go in the house?
Ans. No sir.
Ques. Who did you talk to there?
Ans. I seen nobody but Anna and Izella Thomas.
235 Ques. Did you talk to them?
Ans. Yes sir.
Ques. Camile's wife is your sister Anna.
Ans. Yes sir.
Ques. Was that Anna on the stand here to-day?
Ans. No sir.
Ques. Did you see Ella Baldwin there?
Ans. No sir, I didn't see her. No sir, I didn't go in the house.
Ques. Ella Baldwin wasn't out there looking at you and your horse and talking to you?
Ans. No sir, I never went in the house, I just got down and straightened my saddle and got back on my horse.
Ques. I guess if you didn't see her, she wasn't there talking with you; you will so swear, will you?
Ans. Yes sir, I didn't talk to any one but Anna.
Ques. No one but Anna, your sister?
Ans. Yes sir; my sister in law?
Ques. That is Viola, you mean?
Ans. Yes sir.
Ques. That is Camile's wife?
Ans. Yes sir; I didn't go in the house.
Ques. Do you remember hearing this girl upon the stand say that she stood as far from you as those seats and talked with you; this girl Ella Baldwin?
Ans. After they came up to the house?
Ques. I say, did you hear her say that?
Ans. Yes sir.
Ques. She is mistaken about it?

Ans. Yes sir, they was coming up——

Ques. I say she is mistaken when she says you were standing about that far from where she was; she was not on the porch of the house talking to you, she was coming up; what direction was she coming from?

Ans. When I went down the road I met her.

Ques. Who was with her?

Ans. I never seen any one with her.

Ques. Was she by herself?

Ans. Yes sir.

Ques. Getting dark, was it?

Ans. No sir, it wasn't quite dark.

Ques. Just dusk?

Ans. Just about.

Ques. Did you see Izella anywhere around?

Ans. Yes sir.

Ques. Where did you see her?

Ans. She was coming down *passed* my house with this other boy.

Ques. Isella isn't a boy, is she?

Ans. No; she was coming down with this other fellow, they passed my house when I was in the house.

Ques. When they passed your house, you was in the house?

Ans. Yes sir.

236 Ques. You wasn't just leaving Camile's house when they came up?

Ans. No.

Ques. Then they are mistaken about that?

Ans. Yes sir.

Ques. Well, now, how long had you been at the house when they passed; when Izella Thomas and James Jones passed your house?

Ans. I don't know, sir, exactly.

Ques. Which side of your house did they pass on, Marcellus; I mean by that with reference to the road. Now, take this to be your house; this is the little field; there is a road that Homer Townsend pointed out running to the left of your road: Now, you live on that road and come around to this road, don't you? This is Camile's; there is the culvert; you come up here and turn out there and go to the house?

Ans. That is all wrong.

(Defendant sat down and drew a diagram of the road and locations.)

Ques. What is this?

Ans. That is where my house is.

Ques. Where is the fence on this side?

Ans. Here is the fence right on this side.

Ques. Now where is your house with reference to this field?

Ans. My house sits right at the end of the field.

Ques. Now, show that place where you went up to at the side of the road on your horse behind that tree and shot that man?

(Objected to by counsel for defendant, as an assumption, not based on and testimony.)

Ques. This road goes right around my house and goes on down and goes in the Montgomery road by the bridge?

Ques. There is a bridge up here?

Ans. Yes sir, about ¾ of a mile.

Ques. What is this you mark here?

Ans. That is a lane that goes on down to my mother's house.

Ques. Your mother's house is here?

Ans. Yes sir.

Ques. How far from your house?

Ans. I suppose about 400 yards.

Ques. Now, where was this place you shot from?

Ans. The road goes around this way on this curve; when I came from my house those fellows rode up behind me——

Ques. I am asking you where the point was, where you was when you shot them?

Ans. I was around that bend.

Ques. Where is that timber?

Ans. That is all woods along there.

237 Ques. This is all woods where you was?

Ans. Where they was. I was coming back; they were north of me.

Ques. They were north of you when you shot them; you shot them from the south?

Ans. Yes sir, they were north of me. After they came after me *in* run in here and turned out.

Ques. Show the Bruce field? (Witness marks it on the diagram.)

Ques. Is it on the other side of that road?

Ans. No sir.

Ques. Does it run out to the road?

Ans. The county road runs down upon that side of it over there, right here it comes right close to the edge of the road.

Ques. This is the Bruce field?

Ans. Yes sir.

Ques. Now what is this?

Ans. This is a low pond.

Ques. This is an open space in there?

Ans. That is all timber in there.

Ques. Not fenced up yet?

Ans. No sir.

Ques. How far is it from that point to this fence over by the road. 93 yards by measurement, ain't it?

Ans. No sir, hardly, I don't know the exact distance.

Ques. Come here and show the jury what you have got there? (Witness does so; illustrations from diagram drawn by witness.)

Ques. There is nothing to hinder you from riding from your house right up to that point?

Ans. What do you mean?

Ques. If you wanted to ride from your house up to where this killing occurred there was nothing there to hinder you; I say you could do it; you could ride right through there on horseback?

Ans. I suppose I could, if I wanted to.

Ques. Nothing to hinder, is there, Marcellus?
Ans. No sir.
Ques. What I mean is, that it is not shut up there so that you could not go through there on horseback?
Ans. No sir, it is not fenced up yet.
Ques. Now, you make this as the Bruce field?
Ans. Yes sir; that takes in my field; here that goes right across to the corner of the Bruce field.
Ques. This is an open place in here not fenced up?
Ans. No sir, it is not fenced.
Ques. The shooting occurred east of the corner of that fence?
Ans. No sir, north.
Ques. North or east?
Ans. No sir, north.
238 Ques. Well, if those men found tracks where a horse had turned suddenly out of the road and run out to that corner of that fence and they found Blair there, then what do you say?
Ans. I don't know anything about that.
Ques. Here where you make that mark in the corner of the Bruce field?
Ans. Yes sir. The shooting was up here.
Ques. This wedge you spoke of was up here about ¾ of a mile?
Ans. Yes sir.
Ques. Marcellus, when you got back to Camile's I understand you that the only persons you saw there was Anna, your sister; that is the one that ain't here?
Ans. Yes sir.
Ques. And your sister in law?
Ans. Yes sir, those are the only two I seen upon the gallery.
Ques. Those were the only two you saw there?
Ans. Yes sir.
Ques. Where was you when you say those two men loped up behind you?
Ans. Just coming round the point of my yard fence coming on into the road.
Ques. Now, Marcellus, when you went to your house and got your gun, why didn't you go on up through this lane and up across there the nearest way to Bird's?
Ans. I was going my nearest way; that was my nearest way.
Ques. There is a road through there, ain't there?
Ans. Well, this is a plain big road in there; the road goes down to the house.
Ques. It wasn't as near as to go through that lane, was it?
Ans. There was a road going through there; that road goes down to my mother's.
Ques. It is a plain open road?
Ans. Yes sir, but it goes to my mother's house.
Ques. You would have to cross the road to pass Bruce's field?
Ans. I had to cross Bruce's field to go to Bird's.
Ques. This little lower end?

Ans. Yes sir. I went on down the side of Bruce's field on the straight road.

Ques. How far did Bird live from that road?

Ans. He lived right on the side of the road.

Ques. What time of night was it you got your gun?

Ans. I got home just after dark. I didn't just go in and get my gun, I got off my horse and went in and asked my little girl
239 where my wife was, and she said she had, she said she had gone over to John Swinford's for water.

Ques. Did you wait for her to come back?

Ans. No sir.

Ques. Why did you go around up there for your shot gun if you was going after the wedge?

Ans. I had to go home——

Ques. I know you had to go home; but you had turned out of the road up here and then had got back in to this road?

Ans. Well, I was going on up there, and I thought I would take my shot gun with me, I was used to taking it with me.

Ques. When those men loped up behind you, which one was on the right side of the road?

Ans. I didn't know the man's name.

Ques. Was he the man on the big horse or the little horse?

Ans. The man on the big horse was right next to me.

Ques. What do you mean by next to you?

Ans. The man on the little horse was right opposite the man on the big horse.

Ques. Which side was you on?

Ans. I was on the right side of them.

Ques. You ran about 250 yards?

Ans. Yes sir.

Ques. That was after you got your gun?

Ans. Yes sir.

Ques. You had your gun when they were running you?

Ans. Yes sir.

Ques. Then the dead man's statement that time is a mistake, just like your witnesses that you didn't have your gun at that time?

Ans. The dead man——

Ques. Mr. Blair's dying testimony that you didn't have your gun at that time, he is mistaken, like your witnesses when they contradicted you; just like old man Bird, when he says that you asked him about that wedge at three o'clock that afternoon.

The COURT: I don't think that is proper.

Ques. Now, Marcellus, which one of those men was the closest to you when you made that first run?

Ans. The first run? The one on the big horse.

Ques. He was right after you, was he?

Ans. Yes sir.

Ques. Those men were coming right after you, were they?

Ans. Yes sir, he was the man who pulled the gun and said See this .45? and I said yes sir.

Ques. Did you see it?

Ans. It looked like he had something in his hand; I took it to be a gun.

240 Ques. You looked back, did you?

Ans. Yes sir.

Ques. Where was you then with reference to your lower fence corner?

Ans. I wasn't more than 300 yards from my house.

Ques. You ran up this road?

Ans. Yes sir.

Ques. How far, Marcellus, did you say they run you?

Ans. They run me about 250 yards.

Ques. You have marked a sharp point in the road here?

Ans. Yes sir.

Ques. Was you up to that point when you turned?

Ans. I was right there about that point.

Ques. Which way did you go from there?

Ans. I went out towards a field my mother had.

Ques. You went up there and came back into the road?

Ans. No sir, I didn't come back in the road up there.

Ques. How was it you met those men up there?

Ans. I was going north, and was going in the road.

Ques. What did you want to go north for at that point when Bird lived over here?

Ques. Bird lived up by Bruce's field; that is away north of Bruce's field.

Ans. I came right opposite to Bruce's field down to this corner. That is Bruce's field.

Ques. Did Bird live there?

Ans. Bird lives down here towards the bridge.

Ques. Did he live as far up as where those two roads join?

Ans. He lived above where those two roads join.

Ques. Then you were going up that road?

Ans. Yes sir.

Ques. How far were these men north of you when you came into the road behind them?

Ans. About 75 or 80 yards.

Ques. You mean 80 yards from the distance they ran after you?

Ans. I mean where I came into the road.

Ques. Was the moon shining that night?

Ans. Yes sir.

Ques. You say you had been run out of the road and didn't see the men up there?

Ans. I seen them standing at the left hand side of the road.

Ques. As you were going north?

Ans. Yes sir.

Ques. Which one was off his horse?

Ans. I don't know sir, I saw one of them off on the ground.

Ques. Was he off the big horse or the little one?

Ans. I don't know, I could not tell.

241 Ques. How did they run into you?

Ans. The one on the big horse run in behind me; this one on the ground called me a black son of a bitch and hit at me. When

I got up there where I could see them, they were about as far from me as that man.

Ques. Do you mean this gentleman on the jury or this one here?

Ans. This one here.

Ques. Why didn't you turn around and run?

Ans. I tried to wheel my horse and run but one of the men run in behind me and struck at me and called me a son of a bitch; then I tried to wheel my horse and turn this way, then the man on the ground ran around and grabbed my bridle rein when I went to turn out of the road.

Ques. You were riding going north, and you went to turn out of the road?

Ans. Yes sir.

Ques. And you just throwed your gun down on him and shot him?

Ans. I didn't throw my gun down, I just held it down that way, I never lifted it up.

Ques. How close was you to this man, so close you had your gun right up against him?

Ans. Yes sir.

Ques. How close was you to the other one?

Ans. The other one when I shot him? Probably as far as from here to that fellow there.

Ques. Which one did you shoot first, the man on the ground or the man on the horse?

Ans. The man on the horse, he was right beside me striking at me and I dodged from him; I had my gun right across my horse that way and I shot him first; then when this one ran around and caught hold of my horse's rein, I just turn the gun right around on him. This fellow on the horse was cutting at me.

Ques. Here is the road running north and south. Now, was he north of you or south of you?

Ans. He turned right across the road.

Ques. I will say I am across the road, I am south of you, was he south of you?

Ans. He was just like you are now, I had my face turned this way.

Ques. Which way was you facing, in what direction there. You know; was you facing north, south, east or west; you know which way it was?

242 Ans. Rather to my right.

Ques. Well the right hand is east as you go the road; was you facing towards your mother's?

Ans. No sir, I had my face kind of across.

Ques. What do you mean by kind of across, across what?

Ans. Well, the first man, he was on that side.

Ques. On what side?

Ans. On the left hand side of me.

Ques. Going out?

Ans. Going north.

Ques. Come here and show it to the jury; I want to see how, you say it was here; that is where you say the men were?

Ans. Yes sir, that is where the men was, I was coming on around here; here is where they run me out; I came on back here and stayed about 25 minutes, until I thought they were passed where old man Bird lived. Old man Bird lives down here. I came down this road; those fellows were standing right up here.

Ques. Now, let us get at it. Was you south of them or north of them?

Ans. When I rode up?

Ques. Yes, when you rode up?

Ans. I was south of them.

Ques. Then you shot south—the first man?

Ans. No sir, that man was out sort of behind me; this other one was standing kind of northeast of me.

Ques. This man was here, and you was here?

Ans. Yes sir.

Ques. This man ran in behind you?

Ans. Yes sir.

Ques. Which way was your face, was your face over this way, or down this way, show which way you were facing?

Ques. This man was here; I had my face kind of turned across the road this way.

Ques. You were standing looking kind of northwest?

Ans. Yes sir.

Ques. Where was the first man?

Ans. The first one was standing kind of out this way.

Ques. Standing out west of the road?

Ans. No sir standing right beside me.

Ques. What was he doing?

Ans. He was cutting at me; he struck twice at me.

Ques. He was standing was he?

Ans. He was on his horse.

Ques. He had caught your horse had he?

Ans. He had caught my horse and was cutting at me.

243 *Ques.* He was cutting at me with his right hand, and the other fellow was holding my horse with his right hand.

Ques. Was his horse facing you?

Ans. He didn't have any horse at all.

Ques. You say you shot the first man on the horse?

Ans. Yes sir, with his hand——

Ques. Let us take one thing at a time. The first man you shot was on his horse?

Ans. Yes sir.

Ques. Did that man have hold of your bridle rein?

Ans. No sir.

Ques. He didn't have hold of anything; he wasn't within reach of you?

Ans. Yes sir, he struck at me twice.

Ques. Why didn't he strike you if he was within striking distance?

Ans. I dodged him. I dodged that way, and turned my gun on him and shot.

Ques. That was the man on the big horse?

Ans. Yes sir.

Ques. At that time where was the man on the ground?

Ans. Holding my horse.

Ques. He was holding your horse when you shot the first man?

Ans. Yes sir.

Ques. Why didn't you sho-t the man on the horse last?

Ans. Because I knew that he was cutting at me and would get me first if I didn't sho-t him first—he would cut me to death.

Ques. The man you shot first, was his face towards you?

Ans. Yes sir.

Ques. Right square facing straight in front of you?

Ans. Yes sir.

Ques. The second one on the ground, was he *he* right straight in front of you too?

Ans. Yes sir.

Ques. Then how do you account for it if the doctor says that both shots ranged from the same direction; here is a man with his arm shot, the shot coming from over in that direction and not straight in front, if the doctor ain't mistaken like you think those witnesses are, how is that Marcellus? (No answer.)

Ques. Now, Marcellus if that range of the shot is correct; if the doctor is correct about that range of shot, and according to the location and range of the shots, they came from the right and not in front, how do you account for your statement that they were both right in front of you when you fired?

Ans. Well, couldn't they be both in front of me, here is one had my horse by the bridle rein and here is the other one right up in front of me striking at me twice before I shot.

244 Ques. You wouldn't be absolutely certain that those men loped up behind you after you came from your house and came back into this road, would you?

Ans. How do you mean coming back into the road?

Ques. Well, you had been to your house after your gun you said?

Ans. That was afterwards; I never got my gun until I came back from Camile's down to my house.

Ques. I have got back to that time; after you left Camile's you went to your house and got your gun, then you came back south a little?

Ans. No sir, I didn't have to come back south. Here is the road; I rode right down in the road, and went on the west side of that fence just right along the road.

Ques. You had then got into that road, when they loped up behind you?

Ans. Well, I hadn't got more than 15 feet in it when they loped up.

Ques. Well, after this conversation you have detailed, you loped out ahead of them, is that right?

Ans. Yes sir, I never went ahead of them until after they asked me my name.

Ques. You ran away from them about 250 yards, right along that road, before you turned out in the woods?

Ans. No sir, I never did get away from them until I turned out; when I turned out they were behind me in the road.

Ques. Well, horses running that way it will show it in the sand in the road; you know that, don't you?

Ans. Yes sir if it is soft; but often it will show no signs of horses running.

Ques. That is kind of soft sandy land there ain't it?

Ans. No sir, in dry weather like that the ground was hard.

Ques. Well, did you hear Izelle testify?

Ans. Yes sir.

Ques. Well, did you hear Jim Jones testify?

Ans. Yes sir.

Ques. Did you hear their statement that they met two men near the north end of the lane?

Ans. Yes sir.

Ques. That is north of where you turned into the road is it not?

Ans. Yes sir.

Ques. Now, then, you heard them testify that they met those two men up there and that in about 20 minutes afterwards after they walked down to Camile's house they met you down there; you heard that testimony?

Ans. Yes sir.

Ques. Then, they are mistaken about it?

Ans. I don't know sir.

245 Ques. If those men were up there at the north end of the lane fully 20 minutes before you left Camile's, where could those men have been all that time?

Ans. I don't know.

Ques. You didn't see anything of them when you went from Camile's house to your house, you say?

Ans. No sir.

Ques. You say they came from the south?

Ans. Yes sir.

Ques. And not from the north?

Ans. No sir.

Ques. And loped up behind you?

Ans. Yes sir.

Ques. Now, after you had shot those two men did you see them fall?

Ans. Yes, one of them fell off his horse.

Ques. Which one?

Ans. I don't know which one.

Ques. Where did he fall?

Ans. Well, he fell kind of on the back side of the road.

Ques. Right there? What became of the other one?

Ans. He ran off down the side of the road.

Ques. On foot or on horseback?

Ans. On foot.

Ques. How do you account, then, for one of them being 75 to 100 yards west of that road, pretty — in a straight line from where the horse wheeled in the road, and being found out there at the corner of Bruce's field?

Ans. I don't know where they went.

Ques. You said that one of them fell off his horse right in the road, was that the one that went off down the road?
Ans. No sir, one of them ran off down the side of the road.
Ques. Which way did he run?
Ans. He went right back this way.
Ques. Now, let us get back from that time, Marcellus, Now, after you had shot those two men, what did you do?
Ans. I came back to my brother's.
Ques. What brother's?
Ans. Brother Camile's.
Ques. You came right down the road?
Ans. Yes sir.
Ques. Right in that same road?
Ans. Yes sir, this same road.
Ques. I mean this same road these men traveled, or had been traveling?
Ans. Yes sir, I came back there.
Ques. On this crooked road?
Ans. Yes sir.
Ques. You came back on this same road?
Ans. Yes sir.
Ques. Then it is not true that you went north of that road, north of shooting?
Ans. No sir.
Ques. You came back to Camile's?
Ans. Yes sir.
246 Ques. You say this man ran south of the road?
Ans. That was after the shooting, he crossed the road.
Ques. Well, was you on this road here or over this way; was he on the road going south, the one that goes down towards Camile's?
Ans. After I turned around, that would throw me to the right.
Ques. Then he was west from the road?
Ans. Yes sir.
Ques. Was that the little short man, or the other man?
Ans. I don't know sir.
Ques. Was he a little short man?
Ans. I could not tell.
Ques. The man who was not on a horse, he was outside of the road, was he?
Ans. Yes sir. He ran outside of the road after I shot him.
Ques. Where was you standing then?
Ans. I wheeled right back from them after I shot.
Ques. You wheeled and went on down towards Camile's? Where did you leave this man standing, the one on foot?
Ans. He is the one that wheeled right back and ran across the road.
Ques. Did he run west or east?
Ans. He ran right west.
Ques. Where was he when you last saw him?
Ans. He was right in the road.
Ques. He didn't fall at all?

Ans. No sir.

Ques. The man you saw run across the road didn't fall; the man on the horse fell; where did he fall?

Ans. The man on the horse fell right back in the road.

Ques. Where was the other man's horse?

Ans. I never saw but one horse.

Ques. You never saw but one horse and two men? Then, you went back to Camile's?

Ans. Yes sir.

Ques. Who did you find there?

Ans. I didn't find anyone there but my sister.

Ques. Which one of your sisters?

Ans. Sister Izella.

Ques. This one who has been on the stand?

Ans. Yes sir, I asked if Camile was at home and she said no, and I just rode right away.

Ques. You rode right away, where to?

Ans. I went to Westfield.

Ques. Now you came right down this road where the man had fallen off his horse?

Ans. Yes sir.

Ques. Why didn't you go up there and tell your wife something about this shooting?

Ans. Well my wife wasn't there.

247 Ques. You said she had gone for water, and that your little girl was there. How old was your little girl?

Ans. 8 years old.

Ques. You didn't go home and stay there, you went back up to Camile's?

Ans. I came up to my house first.

Ques. You didn't even go up home again, after you were at Camile's?

Ans. I never got down at all at Camile's.

Ques. But you went on to Westfield; which way did you take to go to Westfield?

Ans. Well, I went down that other road a piece and then turned into the county road and went on down to Westfield.

Ques. You went down to this fellow place who had married your cousin?

Ans. Yes sir.

Ques. And there you went to bed?

Ans. Yes sir.

Ques. That is where you were the next morning?

Ans. Yes sir.

Ques. Now the horse that you rode down to Westfield, was that the same one you rode away from there the next morning?

Ans. Yes sir, the same one I was riding that night.

Ques. You never did get off your horse from the time of the shooting until you got to Westfield?

Ans. No sir.

Ques. Was your horse broken or used to being shot over?

Ans. No sir.

Ques. Did he jump much when you fired that time?

Ans. Yes sir, but there was some one holding him.

Ques. Now when you shot the first man, did the man holding your horse turn him loose?

Ans. No sir, he held on to the reins, he ran around and had something in his hand I took to be a gun, and I shot him.

Ques. He held your horse so you could not get away, and so you could not keep from shooting him. He didn't flinch; he just stood there and waited for you to shoot him—he waited right there until you shot him, did he?

Ans. He tried to shoot me.

Ques. What was to keep him from shooting you if he had his pistol in his hand, and you had a big unwieldy shot gun? You had shot the other man at close quarters; what was to keep him from shooting you that very instant?

Ans. Well, he tried to; I guess he got excited.

Ques. Was you excited too?

Ans. No sir, not much.

Ques. You wasn't a bit excited, was you?

Ans. Not very much.

248 Ques. Well, when you got to Westfield, who did you find there?

Ans. I saw Freeman Scott when I got there.

Ques. And you say that when Mr. Townsend got there the next morning, he didn't tell you that anything you would say to him would be used against you and not for you?

Ans. No.

Ques. That is not true?

Ans. No.

Ques. Now, you stated to Mr. Townsend what you have stated to this jury and not what he says you did; is that right?

Ans. Yes sir; he just came in and asked me to get up, and after I got up, he asked how the thing happened and I told him, like I have done here.

Ques. Now Marcellus is it not a fact that you rode out of Spring somewhere near the time those two men did?

Ans. I don't know.

Ques. Did you see them in Spring that evening?

Ans. No sir.

Ques. Was you down about Mr. Gedeke's store?

Ans. No sir.

Ques. You wasn't down around there at all that day?

Ans. No sir.

Ques. Now is it not a fact that you rode along behind those men and came up with them in the road, and when one of those two men told you you were a nigger, that it made you angry, and that you just rode on ahead of them, went to your home and got your shot gun and when they came by on that road, you were waiting for them and shot them both?

Ans. No sir.

Ques. That didn't make you mad at all?

Ans. No sir, I have had a great many white folks talk to me that way.

Ques. It didn't make you mad to have them call you a nigger?

Ans. I just wondered what was the matter with them; I didn't know who they were, they were strangers to me.

Ques. Now ain't it a fact that when you went around up there to your house you went in a hurry, and that you got your gun, without your wife knowing what you were going to do; that you hustled away from home and ran down that lane to the point where those men have described the horse tracks were, and when those men got very near to you, you fired first at the one and then at the other, and then wheeled your horse back up that road, and that your horse made the track of that *hoff* in the road, like these men have de——

Ans. No sir.

249 Ques. There is not anything like that in it?

Ans. No sir.

Ques. Did you see your wife at any time at all after the shooting?

Ans. No sir.

R. M. CHESHIRE, called as a witness by the defendant, first duly sworn testified as follows:

Ques. Is your name R. M. Cheshire?

Ans. Yes sir.

Ques. Where do you live Mr. Cheshire?

Ans. I live in Wilburton.

Ques. How far from Spring?

Ans. 8 miles.

Ques. Are you acquainted with Marcellus Thomas?

Ans. Well, I can't say I am very well acquainted with him. I have known him off and *of* since he was a small boy.

Ques. How long have you lived at Wilburton?

Ans. About 23 years.

Ques. Have you been knowing the defendant all the time you have lived there?

Ans. Well, I guess I have known of him; I knew his father there very well.

Ques. Do you know the general reputation of Marcellus Thomas in the community in which he lives, as a quiet, peaceable law abiding citizen?

Ans. Well, I don't know what people generally say about him; I never heard them say anything about him.

Ques. Then, you say you don't know?

Ans. Well, I never heard him talked about.

Ques. I asked you if you knew his general reputation, say yes or no.

Ans. Well, I don't — what others say.

Ques. You have never heard anything against it?

Ans. No sir.

Cross-examination:

Ques. You say you don't know his general reputation up in the community where he lives?

Ans. I don't know much about him; I have seen him quite often and had some business up there in Spring at one time near his mother's house and I was acquainted more with his father.

Ques. You don't know anything about what his disposition might be as to using violence?

Ans. No sir.

Ques. You don't know what he might do if he thought he was insulted by white men at night, if he had a shot gun handy?

Ans. No sir.

250 HENRY WEST, called as witness by the defendant, first duly sworn testified as follows:

Ques. Is your name Henry West?

Ans. Yes sir.

Ques. Where do you live?

Ans. I live in Spring or near Spring.

Ques. How long have you lived there?

Ans. About 40 years.

Ques. Do you know Marcellus Thomas?

Ans. Yes sir.

Ques. How long have you known him?

Ans. Well, I believe he was born and raised up there.

Ques. Do you live close to him—this defendant?

Ans. Yes sir.

Ques. How far from him do you live?

Ans. About a quarter of a mile.

Ques. Do you know the general reputation of the defendant in the community in which he lives with reference to being a quiet, peaceable, law-abiding citizen?

Ans. Good as far as I know.

Ques. Do you know his general reputation in that regard.

Ans. Yes.

Ques. Is it good or bad?

Ans. It is good, yes sir, as far as I know.

Cross-examination:

Ques. Who gave him that reputation?

Ans. Well, I never heard any one speak any wrong of him.

Ques. Did you give him that reputation, or is that what people say generally?

Ans. Well, I never heard anything wrong of him.

Ques. Just answer my question; who did you ever hear give him that reputation?

Ans. Well, I don't know as I can call any names, I could not tell of any one especially.

Ques. What has caused his reputation to be called in question?

Ans. Well, I don't know of anything being spoken of him wrong

Ques. Is it not a fact that he is known as a sort of quarrelsome and dangerous nigger even among his own color?
Ans. Not that I ever heard; he may have been, but I never heard of it.
Ques. Then you don't know a great deal about him?
Ans. No sir, I don't know a great deal about him.
Ques. You don't know what he might do——
Ans. He may have done a good many things and I not know of it.
Ques. You don't know what he is likely to have done if he felt that he had been insulted by a couple of white men in the
251 night time and had a shot gun close by?
Ans. No sir.

EMILE WINCHIE, called by the defendant as a witness, first duly sworn testified as follows:

Ques. Is your name Emile Winchie?
Ans. Yes sir.
Ques. Where do you live Mr. Winchie?
Ans. At Spring
Ques. How long have lived there?
Ans. All my life.
Ques. Do you know Marcellus Thomas?
Ans. Yes sir.
Ques. Does he live near Spring?
Ans. Yes sir.
Ques. Do you know his general reputation in the community in which he lives with reference to being a quiet, peaceable, law abiding citizen?
Ans. No sir.
Ques. You don't know?
Ans. No.

ELI LAMB, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Is your name Eli Lamb?
Ans. Yes sir.
Ques. Where do you live Mr. Lamb?
Ans. Near Spring.
Ques. Which way from Spring?
Ans. I live south, a mile and a half.
Ques. Do you know Marcellus Thomas?
Ans. Yes sir.
Ques. How long have you known him?
Ans. Well, I have known him a good long while, could not say exactly how long.
Ques. Do you know his general reputation in the community in which he lives in reference to being a peaceable, quiet, law abiding citizen?
Ans. I don't know anything bad——
Ques. State whether or not you know?

Ans. Well, I can't say that I know anything bad about him.

Ques. I asked you if you know what his general reputation is, what people generally say about it?

Ans. Well, it is good.

Ques. Do you know?

Ans. It is good as far as I know.

Ques. You answer that you know or don't know?

Ans. Well, I don't know anything bad about him, it is good; I have known him a long time, it is generally good.

Ques. You say his reputation is good?

Ans. As well as I know.

Ques. As being a peaceable, law abiding citizen?

Ans. Well, yes, as far as I know.

252 Cross-examination:

Ques. You say as far as you know?

Ans. Yes sir.

Ques. Do you know what Mr. Townsend and other men up there say about his reputation?

Ans. Well, no I don't know.

Ques. What business are you in?

Ans. Farming.

Ques. Has this nigger ever worked for you?

Ans. Well, yes sir.

Ques. Well, have any other of his kin folks worked for you that you know of?

Ans. No sir.

Ques. None of them have worked for you besides him?

Ans. Well, I believe his brother has worked for me.

Ques. Do any of his women folks stay about your place?

Ans. No sir.

Ques. All you know about him is what you saw of him in running your place?

Ans. Yes sir.

Ques. You don't know what the people in the community — him in regard to whether if he thought he was insulted by white men and had a double barrel shot gun handy what he would do?

(Objected to by defendant's counsel.)

Ques. Well, do you know what people generally think of him?

Ans. Well, I don't know that I can say I do.

Ques. Well, Mr. Lamb from what you know of him, are you prepared to say you know his characteristic, whether if he had a double barrel shot gun handy he would kill a couple of white men if he thought he was insulted by them?

Ans. Well, of course he might.

Ques. Well, if a man taken a double barrel shot gun to redress a fancied or real insult, like this defendant, if he thought he was insulted, you wouldn't say that you know enough about him to judge whether he is calculated to do a thing of that sort, or do you?

Ans. Well, he might, I don't know.

NEAL MCDOUGAL, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Where do you live?
Ans. In Spring, Harris County, Texas.
Ques. Do you know the defendant, Marcellus Thomas?
Ans. Yes sir.
Ques. How long have you know- him?
Ans. I have known him, I could not say exactly how long, but for some years, I know I knew him before he was grown.
253 Ques. Do you know his general reputation in — which he lives with reference to being a quiet, peaceable, law abiding citizen?
Ans. Well, I don't know anything against — before this.
Ques. Do you know that reputation, yes or no?
Ans. I know nothing against——
Ques. Do you know it?
Ans. Yes sir.
Ques. Is it good or bad?
Ans. Good.

Cross-examination:

Ques. Who did you ever hear discuss his reputation?
Ans. Well, several men who knew him longer than I have.
Ques. Well, what cause- were there to discuss his reputation, if a man is a peaceable man, he don't need any discussing does he?
Ans. Well, yes, sometimes.
Ques. Have you ever heard any man discuss Mr. Oliver's reputation?
Ans. Yes sir, I have.
Ques. For peace and quiet?
Ans. You might call it that; a man could not be a peaceable man unless he was a good man.
Ques. Who did you ever hear discuss his reputation?
Ans. Well, men just get to talking among themselves, and would say he is a good man.
Ques. I am not talking about a good man, I am talking about the reputation of a man for peace and quiet; who have you heard discuss this defendant's reputation for peace and quiet?
Ans. Well, I have heard them say, he is a good nigger; a man could not be a good man unless he was a peaceable man.
Ques. Well do you consider a man who, on a slight insult, or a man who imagines himself insulted, who would take a double barrel shot gun and kill a couple of men, a peaceable man.

(Objected to by the defendant's counsel as not proper cross-examination; immaterial and irrelevant, calling for a conclusion of the witness.)

Ans. Well, I might say I have known such—on great provocation.
Ques. Well, on slight provocation; if he takes a double barrel shot gun and kills a couple of men, would you regard him as a peaceable man.

Ans. Well, I say it is not likely——

254 Ques. I have already stated, upon slight provocation; that is the way I put it?

Ans. Well no he would not be a good man.

Ques. Well, on slight provocation; under the kind of statement I have made, would you call him a peaceable man?

Ans. Well, I don't know what to say about it.

FRANK WINCHIE, called as a witness by the defendant, first duly sworn, testified as follows:

Ques. Mr. Winchie where do you live?

Ans. At Spring station.

Ques. How long have you lived there?

Ans. All my life.

Ques. Do you know Marcellus Thomas?

Ans. Yes sir.

Ques. How long have you known him?

Ans. Well, I have known him since he has been grown up.

Ques. Do you know his general reputation in the community in which he lives in reference to being a quiet, peaceable, law abiding citizen?

Ans. No sir.

FRED WINCHIE, called as a witness by the defendant, first duly sworn testified as follows:

Ques. Where do you live, Mr. Winchie?

Ans. At Spring Station.

Ques. How long have you lived there?

Ans. I was born and raised there.

Ques. Do you know the defendant Marcellus Thomas?

Ans. Yes sir.

Ques. How long have you known him?

Ans. Well, I have known him for quite a good while.

Ques. Do you know his general reputation in the community in which he lives with reference to being a quiet peaceable, law abiding citizen?

Ans. Well, I know that he——

Ques. Do you know his general reputation out there in that respect?

Ans. No sir.

Ques. You don't know it?

Ans. No sir, I could not tell you much about it.

Here the defendant rested his case.

Testimony in Rebuttal by the State.

Dr. J. C. SELLER, recalled, testified as follows:

Ques. Dr. Sellers, when you went to where John Blair was lying, did you examine around on the ground for things that were dropped about there?

255 Ans. Yes, sir, we gathered up several things there.

Ques. Did you gather up everything you could find?

Ans. Yes sir.

Ques. Did you find any weapons of any kind?

Ans. No sir.

Ques. You have already stated, I believe, that when you undressed him you found no weapon of any kind?

Ans. Yes sir.

Ques. Now, Doctor, do you know the general reputation of this defendant in that community out there in respect to his being a peaceable, quiet, and law-abiding citizen, or the contrary? Just answer that question whether you know it?

Ans. Yes sir.

Ques. Do you know his reputation, whether it is good or bad?

Ans. It is bad.

Cross-examination:

Ques. Do you know that reputation from what is generally said about him in that community?

Ans. Well, I never heard anybody say anything much about it.

Ques. Well, if you haven't heard anybody say anything about it, how can you say you know his general reputation is bad?

Ans. Well, I know it from experience.

Ques. From what experience?

Ans. Well, I know it from controversies he has had.

Ques. What do you know about any controversies he has had with anybody?

Ans. Well, I seen it.

Ques. You seen what; what have you seen?

Ans. I saw him have a difficulty with another man of his color.

Ques. When was that?

Ans. I don't know exactly.

Ques. That is the reputation you are talking about, is it?

Ans. Yes sir, I seen that much.

Ques. That is the reputation you are talking about, is it?

Ans. That is some of it.

Ques. That is what you base his reputation on? is it?

Ans. Yes sir, that is it.

Ques. And that man jumped on him, did he not?

Ans. I didn't see him.

Ques. You didn't see him cut him either did you?

Ans. Yes sir.

Ques. You didn't see a thing the other man did to bring on
256 the difficulty did you?

Ans. No sir, I didn't see the beginning of it.

Ques. You just happened to be there when he got cut?

Ans. Yes sir.

Ques. Now is that all you have got to go by to say his reputation is bad in that community?

Ans. Yes sir.

Ques. That is all?

Ans. Yes sir.

Ques. You have never heard one single man say that he had a bad reputation for being a quiet, and law-abiding citizen, have you, prior to this transaction?

Ans. No sir, not anything.

Ques. As a matter of fact, it has never been called in question, has it?

Ans. I never heard it talked about.

Ques. He has always been a hard working, honest negro, as far as you know and have seen?

(Objected to by the state as not a proper question.)

Ques. This is the only trouble you know any thing about, is it not?

Ans. That is all I remember.

Further Direct Examination:

Ques. He has asked you what you have heard about his reputation; now the reputation he has made among his associates; how those parties regard him—that is how you regard him; is that what you speak of?

Mr. ALLEN, counsel for defendant: My objection to that question is that witness has been asked about his general reputation and witness has answered that it is bad; witness has been cross examined upon that point. Now, I submit it is not proper in re-examination to tell witness what general reputation is, and then ask him as to particular parties.

The COURT: He could not tell what his general reputation was until it was defined; I think in view of what counsel for defendant has asked Dr. Sellers, that the question is now proper.

Ques. Dr. Sellers, do you know anything about how he is regarded among his associates—among negroes—do you know how he is regarded generally, as to whether he is peaceable and quiet, among them or not; that is without reference to whether or not you have heard any body discuss it, do you know how he is generally regarded?

Ans. I never heard it discussed.

257 Ques. Do you know without reference to whether or not you have heard them say; do you know of your own knowledge how he stands among them.

(Objected to by defendant's counsel.)

Ques. Well, you spoke from your own knowledge of him, did you, Doctor?

Ans. Yes sir.

J. L. TOWNSEND, recalled, testified as follows:

Ques. Mr. Townsend, on the night of this shooting, I will ask you whether you examined tracks—you have already stated in your former testimony something about trailing down the way that Shropshire was found, and down at the place of the shooting?

Ans. Yes sir.

Ques. Now Mr. Townsend along down there by the defendant's place, 200 or 300 yards up towards the place of the shooting, I will ask you how many horse tracks you found going northward?

(Objected to by defendant's counsel, because not in rebuttal. Objection overruled; to which ruling of the Court counsel for the defendant excepted.)

Ques. Did you notice any sign of horses running along the road there, taking it at the lower end of his place there—say this is his place—along that road; from that point along there, did you see any signs of three horses running?

Ans. No sir.

Ques. Where were the tracks you spoke of. This is Geo. Lindley's. Up by Marcellus', up there by this point?

Ans. No sir.

Ques. From a point opposite Marcellus' house and then on north, did — make any examination there with reference to horse tracks. How many horse tracks did you find going along there, going north?

Ans. Well, going north—well, Mr. Hargrave had gone a little ahead of me.

Ques. You didn't go all the way up?

Ans. No sir, we turned off down towards this lot.

Ques. Did you turn out down where Blair was found?

Ans. Yes sir.

Ques. Did you go up that way?

Ans. Yes sir, up that way we did.

Ques. Did you see any signs of horses running at all?

Ans. No sir.

258 Ques. Do you know the general reputation that Marcellus Thomas bears in the community in which he lives up there as to being a peaceable, quiet, law-abiding citizen or the contrary?

Ans. Yes sir, I do, from hearsay.

Ques. That is what reputation is. Is it good or bad?

Ans. Well I could not say it is good; he has a bad record for trouble.

Ques. Then, it is bad?

Ans. Yes sir.

Ques. Now, Mr. Townsend, when you went up to the place where Blair had fallen, did you examine the ground to see whether there were any weapons about there?

Ans. Yes sir.

Ques. Did you find any weapon?

Ans. None at all.

Ques. Did you search around for things they may have dropped?

Ans. Yes sir.

Ques. Did you look along the road about the place of the killing to see whether you could find any weapons down there anywhere?

Ans. Yes sir.

Ques. Did you find any, or ever hear of any being found anywhere there?

Ans. No sir.

Cross-examination:

Ques. Now, what time was it you went out there and examined for those horse tracks; what time in the day or night?

Ans. For those horse tracks? I believe it was about 12 o'clock.

Ques. 12 o'clock at night?

Ans. Yes sir.

Ques. You don't know how many horses, how many wagons and teams had gone up that road between 7 and 8 o'clock and 12 o'clock?

Ans. I could only judge by the signs in the road where the horses had turned.

Ques. At that time of night you didn't see any tracks up there as though horses had been running?

Ans. I did not.

Ques. You stated when on the stand before your eyesight wasn't very good; you could not detect a track very clearly?

Ans. Not on the hard places.

Ques. How was that road, hard or soft?

Ans. Kind of sandy and dusty.

Ques. Right in the middle of the road, how was it?

Ans. It was sandy.

Ques. You could not pick out any track and say whether a horse was running or walking?

Ans. No sir.

259 Ques. Now, suppose three horses had run up that road along about 8 or 9 o'clock, and some other horses had gone over the road in a walk, in the meantime, do you suppose you could tell whether there had been any running down along there three or four hours before?

Ans. Well, they might have made other tracks along there.

Ques. Well, I say if other horses had traveled over the same ground?

Ans. I think not.

Ques. Now, as to the general reputation of the defendant, how have you formed that judgment?

Ans. From what other people have talked.

Ques. How many people have you heard talk about his reputation as a law abiding, peaceable, quiet citizen?

Ans. Well, I just have heard it talked of there in the neighborhood.

Ques. Who have you heard talking?

Ans. Well, I have heard various people.

Ques. When did you hear them talking?

Ans. Well, several different times; I have heard it talked of lately, and I have heard it talked of some time ago.

Ques. Will you please name one man you have heard talk and discuss his general reputation?

Ans. Well, I have heard Dr. Sellers.

Ques. What did he say?

Ans. Something about an affray. If I am supposed to tell that, I must tell how it came up.

Ques. Well, I want to know what he said; that is what I want?

Ans. Well, he said he heard he had cut somebody.

Ques. Did he tell you how it happened?

Ans. No sir, I never heard how it happened.

Ques. Is that the only trouble you ever heard of him having?

Ans. Yes sir, I know of him having trouble with a man down there; they were fighting.

Ques. You never heard of his being arrested for fighting?

Ans. No sir, not for fighting.

Ques. You are deputy sheriff; was complaint made to you about that?

Ans. No sir, no complaint was made to me.

Ques. If he had been much of a fighter and lawbreaker, you would have heard of it, and you haven't, have you?

Ans. I don't know of anything except that quarrel.

260 Ques. And they didn't think enough about that to go and make a complaint to you as deputy sheriff or to anybody else, to have him arrested?

Ans. They didn't come and complain to me; don't know whether they went to any body else or not.

Ques. How long has he been living up there?

Ans. I have known him for some time; I think I have known him since 1895.

Ques. Have you ever known of his being arrested, charged with fighting or disturbance of the peace, or anything of that character?

Ans. I have never known of him being arrested for fighting at all.

Further direct examination:

Ques. You don't know whether those rows you spoke of were among kin folks or how they came to be hushed up?

Ans. No sir.

Ques. You answered Judge Allen a while ago, as I understood you, that you could only tell from what you saw in the road whether there had been more tracks or not. Did you see any more tracks, except two we have talked of.

Ans. Except the wagon track. After the wagon turned out, I saw no other but those two.

Ques. One of them a large track?

Ans. Yes sir.

Ques. That lead off to where Blair was found?
Ans. Yes sir.
Ques. And the other one was a small track?
Ans. Yes sir.
Ques. Now Judge Allen has asked you if other horses had passed by there as to your ability to see signs of running horses. Running horses tear up the road, don't they?
Ans. Yes sir.

J. F. HARGRAVES, recalled, testified as follows:

Ques. Mr. Hargraves in going over the road that night, say, take the road from about opposite Marcellus Thomas' house on north, was there any signs of as many as three horses running in that road?

(Objected to by defendant's counsel because already gone over.)

Ques. I don't mean north of the place of the shooting, I mean anywhere between the place where the shooting occurred, and down to a point opposite the defendant's house?
Ans. Well, we examined along there, along that road, and there were only two horses traveling to the north and east.
261 Ques. Those two tracks pointed in what direction?
Ans. North.
Ques. Do you know the general reputation which this defendant bears among those who know him in the community in which he lives with reference to being a quiet, peaceable, law abiding citizen, or the contrary?
Ans. Yes sir, I know.
Ques. Is it good or bad?
Ans. Bad.

Cross-examination:

Ques. What time in the night did you examine for horse tracks?
Ans. Well, I don't know the exact time. We got to Spring sometime about dark.
Ques. You went out with the wagon?
Ans. No sir, I went on horseback.
Ques. Did you go before or after Mr. Townsend went?
Ans. Why, I don't know.
Ques. What time did you go to Spring?
Ans. That is what I *saw*, I don't know the time, but it *is* was after night the best I know; after dark or about dark somewhere.
Ques. Did you go down on the train?
Ans. Yes sir.
Ques. You got there about mid-night?
Ans. Well, I believe it was about eleven o'clock.
Ques. It was due at Spring at eleven something; what time did you get to Spring; was it on time, do you know?
Ans. No, I don't know.
Ques. How long did it take to run from Spring to Conroe?
Ans. Well, about a quarter of an hour.

Ques. Then you got down there about 12 o'clock. How long were you in Spring before you went out to examine for tracks?

Ans. I suppose perhaps a half hour.

Ques. Who went with you?

Ans. Sheriff Anderson, deputy Townsend and young Townsend, I forget his name.

Ques. Did you go up in the wagon?

Ans. No sir, I went on horseback.

Ques. The wagon went ahead of you; you followed after the wagon?

Ans. Yes sir, after the wagon.

Ques. The wagon had gone up the road before you got there?

Ans. Yes sir.

Ques. You examined the tracks after the wagon passed along?

Ans. The wagon didn't go up this road where I was on.

Ques. It didn't go out that road?

Ans. No sir, Mr. Townsend wouldn't allow anybody to travel that road. He wanted to have the dogs take the trail.

262 Ques. How was the ground there; hard or soft?

Ans. Why, the ground along the road was soft, dry and sandy.

Ques. If that road had been traveled between 8 and 9 o'clock by two or more horses, would that have made any difference as to the tracks made earlier in the evening as to showing whether there had been made by horses walking or running?

Ans. Well, the road showed but two horses——

Ques. Answer the question. If that road had been traveled after the time those tracks were supposed to have been made there, say along about seven or eight o'clock, would that have made any difference as to how the tracks were made, as to horses going fast?

Ans. Of course, if the road had been traveled, the tracks would have been disturbed.

Ques. You don't know whether that road had been traveled any between 8 and 12 o'clock or not?

Ans. Not of my own knowledge.

Ques. I am talking about what you know, now?

Ans. No sir.

Ques. How long have you known this defendant, Marcellus Thomas?

Ans. Well sir, I have known him, or some of his family, I suppose, 7 years.

Ques. Well, how did you form your judgment as to his general reputation?

Ans. Well, from different ways; different fights he would have with parties, and then some general talk by people.

Ques. General talk; who have you talked with about it?

Ans. Well I don't particularly know—a good many people of his own color.

Ques. When did you hear any of them speak of him?

Ans. Well I have heard it more I suppose since this occurred.

Ques. After this occurred?

Ans. Yes sir, and before, I have heard them speak of it.

Ques. How long before had it been since you heard of any body speak of his reputation out there as a bad man and fighter?

Ans. I have heard of it for a year or two.

Ques. What did you hear?

Ans. Well, I have heard this: the way he generally carried on, fighting and cutting people.

Ques. Who told you that?

Ans. Well, I don't remember now. I know it was talked of to me.

263 Ques. Can you name anybody who told you that?

Ans. I heard it from several.

Ques. Name one of them?

Ans. Well, they were darkies.

Ques. Name them?

Ans. I don't remember their names.

Ques. You don't remember their names; how long ago was it?

Ans. Well I heard several of them talking about it not more than a month ago, possibly, not so long.

Ques. Well, what particular transaction were they talking about?

Ans. Well, they had reference, I suppose, to this case.

Ques. With reference to this case; that is what they were talking about?

Ans. Yes sir.

Ques. You never knew of his being arrested for fighting, did you?

Ans. No sir.

Ques. Well, do you know of it, or not?

Ans. No, sir, not of my own knowledge.

Ques. You don't know of his having a fight with anybody do you?

Ans. Well, I know of one man that was cut by him.

Ques. That is the only thing you ever heard of especially; the only transaction you heard anything about, is it not?

Ans. No sir.

Ques. Just name what the other was?

Ans. Well, that is the only serious row I have heard of him being in lately.

Ques. Well, have you heard of any other serious row at any time?

Ans. No sir, I don't believe I have.

Ques. Was that serious enough for him to be arrested for?

Ans. Well, I could not say.

Ques. As far as you know, he wasn't arrested for that?

Ans. I don't know.

Ques. That is the only man you ever heard of him having any serious row or fight with, is it?

Ans. Yes sir.

Further direct examination:

Ques. When Judge Allen asked you if you knew whether any other horses had traveled along that road, you said not of your own

personal knowledge, then you started in to say something and was shut off there. Do you know from any other way or any other thing; for instance, out there where Blair's horse turned out of the road; take that track?

264 Ans. Well, I will tell you gentlemen——

(Objected to as leading and suggestive of the answer.)

Ques. From where that Blair horse turned off, and follow from that back down the road—the other track you have already testified about—could you tell from those tracks whether any other tracks were made over them or not?

Ans. There were no other tracks over them; we tracked them from where the horses wheeled; and there were no other tracks there.

Testimony closed.

HOUSTON, TEXAS, *January 5;* 1906.

I hereby certify the foregoing as a true and correct transcript of the notes of testimony taken by me on the trial of the case entitled and numbered as appears on the first page hereof.

S. W. BLODGETT,
Official Stenographer.

This transcript having been made at the request of the defendant I hereby approve the same as correct, after making the corrections herein noted, said transcript having been submitted to the interested parties for any objections thereto, and all objections found to be material and well founded having been allowed, and both parties having agreed to said corrections and to this transcript as a correct statement of all the facts proven on the trial of this cause, and I hereby approve same as correct, after having satisfied myself of its correctness and order the same to be filed by the clerk of this court as a part of the record in this cause—This the 19th day of January A. D. 1906. And neither party having requested the plats or sketches offered in evidence to be made a part of this record, but having requested a copy thereof to be made and sent up as a part of this record, it is ordered that the clerk of this court transcribe said plats or sketches and sen*t* same to the Court of Criminal Appeals with other parts of the record herein. Witness my hand this the day and date aforesaid.

J. K. P. GILLESPIE,
Judge Criminal District Court,
Harris County, Texas.

265 We hereby agree that the foregoing statement of facts as correct, is a true and correct copy of the facts and all the facts proven on the trial of this cause. This January 19th, 1906.

W. C. OLIVER,
District Attorney, Counsel for State.
NOAH ALLEN,
Counsel for Defendant.

STATE OF TEXAS, *County of Harris:*

I, O. E. Reynaud, Clerk of the Criminal District Court of Harris County, Texas, do hereby certify that the foregoing is the original statement of facts in case No. 14133, The State of Texas, *vs.* Marcellus Thomas, filed in said court.

Given under my hand and the seal of said court, at office in Houston, Texas, this 31st day of January 1906.

O. E. REYNAUD,
Clerk Criminal District Court, Harris County, Texas.
[SEAL.] By C. A. SMITH, *Deputy.*

Endorsed: No. 3166. 5th Assignment. Criminal District Court of Harris County, Texas. Dec. Term, 1905. The State of Texas *vs.* No. 14133 Marcellus Thomas. Original Transcript of the Testimony. Filed January 19th, 1906, O. E. Reynaud, Clerk of the Criminal District Court of Harris Co. Tex. By C. A. Smith, Deputy. Filed in Court of Criminal Appeals at Dallas Feb'y 2, 1906, J. M. Gaston, Clerk. Filed in the Court of Criminal Appeals at Austin, Texas, March 28th, 1906. E. P. Smith, Clerk.

266 *Certified Copy Order from Dallas Showing Submission and Transfer to Austin.*

Be it remembered, at a term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Dallas, on the 1st day of January, A. D. 1906, (present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks) in the Cause of

Harris County.

No. 3586.

MARCELLUS THOMAS
vs.
THE STATE OF TEXAS.

the following orders were made:

3/26 1906, taken under advisement and transferred to Austin.

Previous Orders.

Feb. 21, 1906, Submitted on briefs and oral argument for both parties.

I, J. M. Gaston, Clerk of the Court of Criminal Appeals of the State of Texas, at the City of Dallas, hereby certify that the foregoing is a true copy of the orders made by this Court in the above entitled and numbered cause.

In witness whereof, I hereunto set my hand and affix the seal of said Court at Dallas, this 26th day of March, A. D. 1906.

J. M. GASTON, *Clerk*. [SEAL.]

Endorsed: No. 3166, 3586. Court of Criminal Appeals of State of Texas Marcellus Thomas *vs.* The State of Texas Transferred from Dallas; Copy of Orders. Filed in Court of Criminal Appeals at Austin, Texas, 3/28/1906, E. P. Smith, Clerk.

267 *Opinion.*

5th Assignment.

No. 3166.

MARCELLUS THOMAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Harris County.

Opinion.

Appellant was convicted of the murder of John Blair, and his punishment assessed at death.

The proof, which was uncontradicted, showed that late on the afternoon of October 9, 1905, John Blair and Shropshire, were in the town of Spring, Harris county, and started to their home, near Wilburton, some five or six miles north of Spring. There is testimony tending to show that they were drinking some, and that they bought some beer in Spring and carried it with them. Both were riding horse back; that they left Spring late in the afternoon, and pursued their journey homeward in a slow gait. When they had gotten about a mile out of the town of Spring, and some 400 or 500 yards north of the house of appellant, at a point in the Wilburton road, both men were killed by appellant. Two shots were fired in rapid succession at close range. This was either at nightfall, or directly thereafter.

The state's theory is, that on their journey towards home, as they were riding slowly along the road, and about a half mile from Spring, they were overtaken by appellant, who was also riding horseback. He rode along behind them, and finally one of them, asked who he was; and he replied, "Marcellus Thomas." They understood him to say, "Dr. Sellars." One of them replied he was not Dr. Sellars," that he was a negro; and they requested him to ride in advance of them instead of behind them. This enraged appellant, and he rode on in advance of them to his house (which was on the road some 400 or 500 yards ahead) procured his shot gun, proceeded up the road, ahead of said parties, and lay in wait for them some 300 or
268 400 yards north of his house, at a point where the timber approached the road, and when Blair and Shropshire ap-

proached the point on their horses, he shot both of them, firing two shots in rapid succession: one at each, which inflicted mortal wounds, and was the cause of the death of both of said parties. Blair was found some 200 yards from the place where the shooting occurred; and Shropshire was found some 400 or 500 yards distant, south, towards Spring. Both were taken to Spring on that night, and medical attention given them. Both died in a day or two after the shooting. Before Blair died he made a dying declaration, which is in accord with the state's theory of the homicide.

Appellant's theory is to the effect that he came from Spring late in the afternoon, and after deceased Blair and Shropshire had left, they preceding him, and having past Camile Thomas (who lived on the road on the route the parties were travelling) some half an hour before he reached there; that he had an engagement to get a wedge from John Bird, who lived about a mile up the road, in the same direction that said parties were traveling. That after stopping at Camile Thomas' awhile and conversing, he went on up the road to his own house, got his shot gun, and pursued his journey, in order to get said wedge, which he expected to use the next day. That he overtook Blair and Shropshire along the road and they accosted him, asked him who he was. He told them he was Marcellus Thomas; they understood him to say, "Dr. Sellars," and told him he was a damn lying son of a bitch, and otherwise abused him, and finally took after him and ran him some 250 yards down the road. He then succeeded in getting into the timber and eluding them; that he remained in the timber some 25 minutes giving them time to get ahead, so that he could proceed after his wedge; that he returned to the road, and in persuance of his journey came suddenly upon Blair and Shropshire, who had stopped in the road. Blair was off his horse on the ground, and Shropshire was on his horse. They immediately attacked him: Shropshire striking at him, as appellant believed with some weapon, and the other
269 grabbed his bridle reins. Appellant believed that they intended to kill him, and shot the one on the horse first, and then turned his gun on the one who held his bridle reins; that he did not go home that night, but went to Westfield, and stayed all night with a relative, where he was arrested the next morning. This is a sufficient statement of the case in order to discuss the questions raised.

Appellant filed a motion to quash the indictment because he was not given an opportunity to challenge the array of the grand jury, and he also made a motion to quash the indictment on the ground that in the formation of the grand jury, he being a negro, his race was discriminated against in the empanelment of said grand jury. He also filed a motion to quash the special venire, because his race and color was discriminated against in selecting and drawing said special venire.

Under our procedure his motion to quash the indictment on the ground that he was not afforded an opportunity to challenge the array of the grand jury is not well taken. Appellant was confined in jail at the time the grand jury was empaneled, and he should have

made a request at that time to be brought into court so as to challenge the array. If he failed to make such request, he cannot be heard afterwards to complain. Kemp *v.* State, 11 Tex. App. 174; Brown *v.* State, 32 Tex. Cr. 119; Barkman *v.* State, 52 S. W. 69. But it seems that, notwithstanding his failure to challenge the array, he can still present his motion to quash the indictment, because his race was discriminated against in the formation of the grand jury which returned the bill. See Carter *v.* State, 39 Tex. Cr. 345, 177 U. S. 342.

Appellant's motions both to quash the indictment on account of race discrimination and to quash the special venire on the same account are in proper form, and under the decisions of the Supreme Court of the United States were made in due time. The court entertained said motions and heard evidence thereon. According to the evidence, we gather that the population of Harris county is about 90,000; and of this number, some 70,000 are white, and 20,000 are negroes, or of African descent. There are some 10,000 or 12,000 voters in Harris county, and of these, from 20% to 25% are negroes, that is, from 3,000 to 4,000 negro voters. According to some
270 witnesses about 25% and according to others not over 10% are qualified voters; that is, according to this estimate there are from 300 to 1000 negroes who are qualified to do jury service in Harris county. Our statutes require that at each term of court the judge shall appoint three jury commissioners for the selection of grand and petit jurors. It is shown that no persons of the negro race have ever been appointed jury commissioners in Harris county. It is further shown that until within the last four or five years, or until the decision *fo* the Supreme Court of the United States in the Carter case, *supra*, and Whitney case, from Harris county, that no negro grand jurors or petit jurors were *were* drawn in Harris county. That since then, or within the last four or five years, the jury commissioners appointed by the judge were instructed by him not to discriminate against the negro race in the selection of jurors. The testimony tends to show that, as a rule one member of the race was drawn for service on the grand jury, and from one to two or three negroes were drawn for service on each week of the petit jury. The method of selecting grand jurors under our law is through the commissioners appointed by the district judge, and is covered by art. 378 Code Crim. Proc. These commossioners select the grand jurors from the body of the county, basing their knowledge of the men selected. Said grand jurors must be able to read and write, and must be of good moral character; and besides qualified citizens of the state and of the county, and qualified to vote in said county, and must be freeholders within the state or householders within the county. From the sixteen selected by the commissioners, twelve are ultimately empanaled as a grand jury by the district judge at the convening of each term of court. As to the special venire, it is drawn from the entire jury for the term, the names being placed in a box and drawn therefrom by the clerk; the number required by the court, when so drawn constitutes the special venire in each case. It is shown that under the plan pursued, one negro was empaneled

on the grand jury, which found the bill of indictment against
271 appellant. It is further shown that no negro was drawn on his special venire. There is a good deal of testimony in the record tending to show that negroes as a general rule were not as well qualified to sit on juries as persons of the white race, either lacking in sufficient intelligence or from a want of morals. Besides this, there is a good deal of testimony in the record showing who are exempt from jury service, under art. 3142 Rev. Civ. Stat. Among these, are all persons over sixty years of age; ministers of the Gospel, engaged in the discharge of their duties; and physicians, attorneys, publishers, of newspapers, school-masters, druggists, undertakers, etc. From the testimony in regard to these exemptions it would appear that a greater pro rata of negroes are exempt than of the white race.

Two of the jury commissioners were placed on the stand, and we quote from their testimony. Rothwell testified he was a commissioner at said term and remembered of one grand juror being drawn who was a negro; and that they drew one negro petit juror for each week of the term. He was asked why there was but one drawn for each week, and replied, "we had so many to draw from who had never served before, and we had to put at least one negro on according to law; that whenever they came across a negro they thought was a good man, they put him on; that they considered a number of negroes, did not know how many and agreed to put one on the petit jury. That they considered the matter, and according to law and the way the judge charged them, they put on colored men; that they did not leave any persons off because they were negroes; that as to the white men they knew them to be qualified before they put them on, and that they did not discriminate the white man from the negro as a man; that we only put negroes on whom we knew were qualified and the same with the white man. J. L. Parker testified that he was a jury commissioner; that they drew some negroes; that they considered negroes where they knew them, along with white persons, for jury service; that they tried to get a qualified list of jurors; that he did not know for certain whether or not there was a negro on the grand jury.

272 We understand the rule to be, under the decisions of the Supreme Court of the United States, construing the XIV amendment, that while a negro charged with crime is not entitled to a negro jury or to a mixed jury, yet the Constitution guarantees him against any discrimination against the negro race, in the selection of a jury by whom he is to be tried. Carter *v.* State, 39 Tex. Cr. 345, and authorities there referred to. So the question for our consideration is, whether or not under the facts as here presented, there was discrimination against the negro race in the formation of either the grand jury which indicted appellant, or in the selection of the petit jury which tried him. We take it, there is nothing in the machinery—that is the laws of the State of Texas regulating jury trials and the selection of juries, which discriminates between the races. But the contention here is, that in the administration of said laws there was such discrimination. While it appears that no negroes were placed by the judge on the jury commission, yet we do not see in this omission any intentional discrimination on the part

of the judge: especially in view of the fact that he instructed these jury commissioners, in the selection of jurors not to discriminate against the negro race. From the testimony of the commissioners it will be seen that, in the selection of both the grand and petit juries, they had this in mind, and they endeavored to comply with the injunction of the court in this respect. It will be seen from the record that with them it was a matter of difficulty to determine on the basis of a pro rata representation as between the whites and negroes: what pro rata of negroes were qualified as jurors. While there might be a discrimination against the negroes, even in the adoption of the pro rata, yet we think that is ordinarily a good test. We are not prepared to say that, considering the testimony as to negroes qualified, and the evidence regarding exemptions,—the jury commissioners did not in the selection of both the grand and petit jurors allow the negro race their pro rata of qualified jurors. That *is* one-twelfth on the grand jury, and about the same per cent. on the petit jury.

273 The fact that no juror of the negro race was drawn on appellant's jury was merely accidental, as those lists are drawn from the jury list for the term of the court which contained from one to three negroes for each week of the term. These were placed in a box along with white jurors, and as it happened none of them were drawn out. Of course, this could not be regarded as a discrimination. It may be that the jury commissioners did not give the negro race a full pro rata with the white race in the selection of grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. We understand the rule to be that mere error in administering the criminal law of the state, or in the conduct of a criminal trial, no federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction. Gibson *v.* Miss., 162 U. S. 591; Andrews *v.* Schwartz, 156 U. S. 272; Bergman *v.* Backer, 157 U. S. 655. So we believe, looking at the record in this case, that the most that can be said is, that while in the selection of the jury, the negro race may not have been accorded its full pro rata with the white race, this was a mere irregularity; and the evidence does not show that the negro race was intentionally or otherwise discriminated against in the selection of said grand and petit jurors. We accordingly hold there was no error in the action of the district judge in overruling appellant's motions.

In this connection we notice that appellant reserved a bill of exceptions to the action of the court refusing testimony tending to show negroes were excluded from voting in the Democratic primary, and that the Democrat*ics* elected the officers of the country, and these were instrumental in operating the machinery of the court, which excluded negroes from serving on juries. The court admitted some testimony on this line, but subsequently rejected further testi-

274 mony. However, we understand that the proof introduced merely showed that the negroes, if they were democrats were

allowed to vote in the primary, but — otherwise. Negroes were not actually excluded because they were negroes, but because they were republicans. It does not occur to us that if appellant could have proven what he stated he expected to prove, this testimony could be regarded as material.

Appellant filed a motion for continuance on account of the absence of Anne Thomas and Elijah Robbins. The application shows that Anne Thomas was temporarily residing in Hardin county, and process was issued for her to that county. Robbins was a resident of Harris county, and process was issued for him to said county. We do not believe diligence was sufficient as to either of said witnesses. It appears that the case was called for trial on January 19, 1906. Process was issued for these witnesses on December 13th, preceding. As to the witness Anne Thomas, the return shows that she was not found in Hardin county, but was supposed to be in Beaumont, Jefferson county. The application itself does not show when this return was made; nor does the attached process show. Of course, when said return was made, it was the duty of appellant then to have pursued his diligence and have issued process to Jefferson county. An inspection of the application for continuance shows as to the other witness, Robbins, that return was made on December 20th, and no further diligence was shown as to him. Appellant says he expected to prove by witness Anne Thomas, that on the evening of the homicide, and before it occurred, she was at the home of Camille Thomas, which was situated near the road, along which deceased and his companion passed that evening, and along which Marcellus Thomas also travelled. According to the state's theory, Marcellus Thomas, overtook the parties before they reached said Camille Thomas' house, and the first altercation occur-ed, after he had overtaken them and before they reached Camille Thomas' house. After this altercation, he left said parties, riding on ahead to his own home, got his gun, then went up the road ahead of deceased and his companion, and lay in wait and slew them. According to appellant's theory, he did not overtake the parties until after they passed Camille Thomas' house and not until he went from there to his own house and got his gun, and had started up the road after his wedge; that he overtook them for the first time then, and had an altercation with them, in which they assaulted and pursued him some distance. He got out of their way, went into the woods, subsequently returned to the road, still going after his wedge, when he overtook the parties again, and they again attacked him and he slew them in self-defense. Now, it seems that appellant expected to prove by witness Anne Thomas, in accordance with his theory, that the parties (deceased and his companion) passed Camille Thomas' house ahead of him, and some 15 or 20 minutes before he arrived; and that he did not have any gun at that time; that when said parties passed Camille Thomas they were in a state of intoxication, using loud and boisterous language along the road, and that after said parties passed Camille Thomas' house they had ample time to have gotten beyond Marcellus Thomas' house at the gait they were travelling, and that Marcellus Thomas could not have overtaken them, unless they had

dallied along the way. In effect the same facts, it is alleged appellant expected to prove by Elijah Robbins; that is, he lived along the road where the parties travelled on that evening, and he saw Blair and Shropshire pass his house, going from the town of Spring in the direction of their home at Wilburton, along the travelled route; that they were then in a state of intoxication; that subsequent to their passing, Marcellus Thomas came past his house and stopped and talked with him; that he had no gun at that time in his possession; that he left there, stating he was going to John Bird's to get a wedge on that evening to be used early the next morning; and that if said parties (deceased and his companion) had travelled t-word their home in the ordinary gait, Marcellus Thomas could not have overtaken them before they passed up the road beyond John Bird's house, or the point where the killing is alleged to have occurred.

276 Appellant proved the same facts in effect by other witnesses besides himself. To our minds it is not a material circumstance whether appellant caught up with deceased and his companion before they reached Robbins' house or Camille Thomas' house, or afterwards. So far as the testimony of the state is concerned, we do not recall that it fixes any particular point along the road where the first meeting of parties occurred. As stated, we regard it as immaterial whether appellant overtook deceased and his companion before they passed Camille Thomas' house or afterwards; and it is immaterial as to appellant having his gun. The state's theory is that he did not have it when he first overhauled the parties. As to the parties drinking that evening, the testimony of the state shows that they were indulging in intoxicating liquor. None of these witnesses pretend to know anything about what occurred when the parties met at the scene of the homicide. It occurs to us that aside from the want of diligence, and aside from the fact that appellant used a number of witnesses to prove the same fact, which he expected to prove by the absent witnesses, that this testimony was not of that material character which would cause a reversal.

Appellant complains of the admission of the dying declarations of deceased, John Blair, proved by the witness John Eads. The proposition advanced by appellant is, to the effect, that the predicate was not sufficiently laid by this witness. It will be seen from an inspection of the record that deceased in the morning made some expressions indicating that he expected to get well, but in the afternoon, between 2 and 3 o'clock, he declared that he was going to die and could not live; and died about twelve hours thereafter. We do not believe the records affords any circumstances indicating that he was not in his right mind. On the contrary it affords evidence that he was. The fact that he did not declare when he was going to die, we think was immaterial under the circumstances. He claimed to be suffering from his wound. He had evidently changed his mind as expressed in the morning as to his condition, and

277 stated he was going to die and could not live. Evidently referring to his then condition, and to the fact that the wounds he had received would cause his dissolution. We think, under the circumstance this was a sufficient predicate to indicate that he was

then conscious of approaching death under all the circumstances which surrounded him when he made the expression. Connell *v.* State, 10 Tex. Ct. Rep. 890; Sims *v.* State, 36 Tex. Cr. 154; King *v.* State, 34 Tex. Cr. 228.

The charge of the court on murder in the second degree is excepted to. The ground of objection to this charge is, that it did not tell the jury that a killing must be unlawful in order to constitute the same murder upon implied malice. We do not agree with this contention. Malice and implied malice had previously been defined by the court; and in this charge the jury were instructed, if they believed appellant shot and killed deceased, with implied malice as before defined and explained, to find him guilty of murder in the second degree.

Appellant also complains of the court's charge on manslaughter, in that the court neglected to charge the jury affirmatively as to what facts would constitute adequate cause. We do not understand that there was any proof of any character of adequate cause defined by statute. The court was therefore not required to charge on this phase of the case as insisted by appellant. The court defined adequate cause under the statute and authorized the jury to consider what occurred at the time, and also all the facts and circumstances bearing on the provocation, and if from these facts and circumstances they believed there was adequate cause, etc., and defendant's mind was excited by passion, and he killed on this account, to find him guilty of manslaughter. We think, under the circumstances of this case, the court was not required to instruct the jury fu-ther than was done.

In this connection it is also insisted that the court should have instructed the jury on cooling time, inasmuch as the testimony both for the state and the defendant showed that there were
278 two difficulties or altercations between the parties; one shortly preceding the fatal encounter. According to the state's evidence, this first altercation consisted of insulting words and conduct by deceased and his companion to appellant. They told him he was a negro, and was not the man they understood he purported to be, and requested him to ride ahead. This could not be considered sufficient provocation to constitute adequate cause if the homicide had occurred at the time. According to appellant's theory they attempted to make an attack, he fled, and they pursued him some 250 yards. He further stated at the time of the fatal encounter, they made a second attack on him, and were assaulting him, as he believed, with deadly weapons, and that he slew them in self-defense. Suppose that he shot too hastily, and he really did not act in self-defense, but was excited by what had occurred before, and their attitude then, this might be manslaughter; and yet we see no necessity for the court to have charged on cooling time, or to have defined cooling time, on the question of manslaughter. The jury were instructed in accordance with the statute, that the provocation must occur at the time, but that they could look to all the facts and circumstances in order to emphasize or intensify the provocation at the time; and of course under this they were authorized,

if they believed appellant's statement, to look back to the preceding transaction. We understand that the charge of the court fully authorized them to do this. The court distinctly told the jury to consider all of the facts and circumstances in evidence: the threats, if any, past conduct and bearing of the parties, and all the facts and circumstances transpiring before, at the time of and after the homicide in determining the condition of defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition. This instruction, of course, comprehended all that had transpired between the parties, on that fatal evening. Appellant's defence of manslaughter was predicated upon his own testimony and the evidence of provocation at the
279 time, testified to by him. The court told the jury that they could consider this, and in that connection, all of the other facts transpiring between the parties before that. We think that this was sufficient. We do not believe that Brownlee *v.* State, 13 Tex. Ct. Rep. 621 is in point. Some four or five minutes after the altercation, according to the testimony of Brownlee, he renewed the difficulty, and struck deceased with a knife. But here, according to the only testimony of defendant (which was his own) the other parties renewed the difficulty, and gave him the right to act in self-defence. But, as stated, if the jury did not believe this phase of the case, they might regard it as a provocation, and then, according to the court's charge, they could view this provocation in the light of all the facts and circumstances that had transpired before this which included the alleged altercation and pursuit of appellant by deceased some 25 or 30 minutes previously. Appellant urges the further criticism of said charge, that it limited the provocation to the acts of deceased, John Blair, and did not embrace his companion, Shropshire. We do not believe this is well taken. The charge in defining manslaughter tells the jury that the provocation must not be given by any person other than the party killed. However, the charge in applying the law to the facts authorized them to view the acts and conduct of both of said parties. We do not believe that the jury were misled by this. Byrd *v.* State, 47 S. W. 721 is not in point. The facts are different. There the court charged distinctly as to an assault made by Alexander himself, omitting any assault by Alexander's wife. Here the court, in applying the law to the facts does not confine appellant's rights to an assault by deceased alone, but authorized the jury to view all the facts and circumstances in evidence at the time and before. Here, according to appellant's testimony, the parties were acting together, as one on both occasions. If appellant's theory be correct, both of said parties were assaulting him at the very time of the homicide; and we do not believe that the jury could have been misled by that portion of the
280 instruction which, in defining manslaughter told them that the provocation must be by the person killed.

As stated before, we do not believe it necessary for the court to group the facts, or tell the jury, further than was done, what Constituted adequate cause. The fact that the court had previously told the jury that an assault and battery so slight as to show no

intention of inflicting pain or injury would not be adequate cause, did not require the court on the other hand, to go further and state what character of facts would constitute adequate cause.

We think the court's charge on self-defense was in accordance with the law on this subject. It distinctly instructed the jury on the basis of danger or appearances of danger from the defendant's standpoint. It further told them that, if from the attack of deceased and his companion, one or both of them, defendant reasonably believed he was in actual or apparent danger, he would not be bound to retreat to avoid the necessity of killing his antagonist, and that he had the right to act on the demonstrations of either or both of them. We think that the charge on self-defense fairly considered was adequate, and covered every phase of the case as presented by the testimony in that regard.

The court further instructed the jury not to consider any statement made to J. L. Townsend, by appellant unless the jury should find that he first warned, and that the same was voluntarily made. This charge properly called the attention of the jury to the matter of appellant's alleged confession and left the consideration of that matter with the jury as they should find the facts.

We have examined the record carefully, and in our opinion
281 it contains no reversible error. We further believe that the testimony was sufficient to authorize the jury to find the verdict which they did. The judgment is affirmed.

HENDERSON, *Judge.*

(Delivered April 25 1906)

Endorsed: No. 3166. 5th Assignment. Marcellus Thomas, Appellant, *vs.* The State of Texas, Appellee. Appeal from Harris County. Affirmed: Opinion by Henderson, Judge. Filed in Court of Criminal Appeals at Austin, Texas. April 25, 1906. E. P. Smith, Clerk.

Judgment.

WEDNESDAY MORNING, *April* 25, 1906.

No. 3166.

MARCELLUS THOMAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Harris County. Affirmed. Opinion by Henderson, Judge.

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered adjudged and decreed by the court that the judgment be in all things affirmed, and that this decision be certified below for observance.

282 *Motion for Rehearing.*

In the Court of Criminal Appeals, Austin Term, 1906.

No. 3166.

MARCELLUS THOMAS
vs.
STATE OF TEXAS.

In the above entitled and numbered cause comes now the appellant, Marcellus Thomas, by his attorney, and moves the court to set aside the judgment rendered in said cause on the 25th day of April, 1906, affirming the judgment of the lower court, and to grant said appellant a re-hearing of said cause for the following reasons, to-wit:

1st.

That the court erred in overruling the appellant's first assignment of error, as indicated in the opinion of the court, in this, that the court erred in its conclusions, finding and ruling against the appellant upon his bill of exceptions taken and reserved on the trial of said cause to the refusal of the trial court to permit further testimony to show that negroes were excluded from voting in primary elections of a dominant party as shown by said bill of exceptions and first assignment of error, for the reason, that said testimony was proper and admissible to show the race prejudice existing in Harris county, and that the same was calculated to and did influence the selection of white men only for jury commissioners, and in the selection of jurors by the jury commissioners excluding therefrom negroes, or persons of African descent, as the same were found drawn among other names in the selection of jurors.

283 2nd.

The court erred in overruling appellant's second assignment of error in its opinion and statement of the facts as indicated in the opinion of the court, wherein the court says: "under our procedure, his motion to quash the indictment on the ground that he was not afforded an opportunity to challenge the array of the grand jury is not well founded," in this, that the record shows that the appellant was not in jail at the time of the empaneling of the grand jury, as found and stated by the court in its opinion, but, on the contrary, the evidence clearly shows without contradiction that the grand jury was empaneled on the 3rd day of October, 1905, and that the offence charged against the defendant in the indictment upon which he was tried was not committed until the 9th day of October, 1905 long after the empaneling of the grand jury. The facts in this case are identically the same as the facts in the Carter case, cited by the court—167 U. S. R., 442. The grand jury having been empaneled before the commission of the offence by the defendant and the defendant not being in jail at the time of the empaneling of the same

and not having been given an opportunity to challenge the array of the grand jury, motion to quash the indictment should have been sustained for that reason.

The court erred in overruling the appellant's second assignment of error for the further and following reasons: that the court failed to fully comprehend the testimony offered by the appellant on the motion to quash the indictment, tending to show race prejudice and wilful/ discrimination against the appellant, and based its opinion upon the bare statement of the jury commissioners Rothwell and J. L. Parker, and others, who stated that they did not discriminate against the negroes in the selection of the grand and petit
284 jurors and the statements of the witnesses that were adverse to the contention of the appellant, wholly ignoring the testimony of the jury commissioners, and other witnesses, which tended to show and did, as we think, clearly show that negroes were discriminated against in the selection of the grand and petit jurors, and in the selection of the grand jury that indicted the appellant, and of the special venire from which the jury was drawn by which he was tried and convicted; that the finding and ruling of the court in overruling said second assignment of error was and is against the weight of the testimony, and does not give to the appellant the benefit of any reasonable doubt that may have arisen on the question of race discrimination from the evidence offered on the hearing of the motion to quash the indictment and is contrary to law; that the court is in error as to the conclusions reached as indicated by the opinion of the court with reference to the selection of grand and petit jurors and the efforts of the jury commissioners to prorate or give to the negroes, or persons of African descent, their proper pro rata proportion of grand and petit jurors according to the number of qualified white and colored jurors; that the proportion as shown by the testimony to have been drawn from the negro race does not correspond with the proportion to which they are entitled upon a pro rata basis as stated in the opinion of the court, as the evidence shows that only one negro was placed upon the grand jury that indicted the appellant, or 1/12 of the jurors, while ordinarily there was but one only and sometimes two, and, on one occasion, three negroes drawn to serve on the panel of fifty petit jurors for each week of the various terms of court for the several years past, while in the two special venires drawn in the two cases pending against this appellant and set for trial on the same day, consisting of seventy-five on each list, there was not a single negro. The court is further in error in this, that the Constitution of the United States guaranteeing equal protection to all classes and prohibiting discrimination
285 against the negro race, does not provide for a pro rata basis in the selection of jurors, either grand or petit, and any attempt on the part of the officers of the trial courts of a state to limit or restrict the number of negroes drawn and to be placed upon grand or petit juries because of their color, whether the same be a full pro rata share of the qualified jurors or not, would be and is a discrimination and a denial of equal rights to them and in violation of the Constitution, and any system of selecting jurors based upon

that theory under which the negroes are left off of the juries, when drawn with white men, because of their color, in an effort to apportion the whites and blacks, would be a discrimination, a ruse and a make-shift for the evasion of the plain letter and spirit of the Constitution and a denial of equal rights and privileges to the colored race, and, as the evidence in this case discloses that fact and that the grand jury by which the appellant was indicted was drawn in this way, and that the petit jurors drawn for the regular weekly panels in the criminal district court of Harris county, where the appellant was tried, and the special venires drawn in the appellant's case were drawn in this way, under that system, the appellant was deprived of equal protection under the law and illegally discriminated against in violation of the Constitution.

3rd.

The court erred in overruling the appellant's third assignment of error, complaining of the action of the lower court in overruling his motion to quash the special venire in said cause, for the same reasons as alleged with reference to the second assignment of error, and for the reason that the court was in error as to its finding and conclusions of the evidence that "the fact that no juror of the negro race was drawn on appellant's jury was merely accidental as those
286 are drawn from the jury list for the term of the court which contained from one to three negroes for each week of the term. These were placed in a box along with the white jurors and as it happened none of them were drawn out," for which appellant has no remedy by motion to quash; and for the further reason that the court was in error as to its conclusions and finding and in overruling said third assignment, because the same is not supported by evidence, is contrary to the law and wholly unsustained by the authorities cited by the court. The case of Gibson *v.* Mississippi, 162 U. S. R., 591, is a case where the defendant having been indicted in a state court for the commission of a crime under the state law, sought to remove the same to the United States court before the trial, alleging discrimination against him on account of his race and color in violation of the Constitution of the United States. The question was presented in that form only and the decision of the court was to the effect that, in order to raise the question of discrimination in the administration of the laws that were themselves not repugnant to the Constitution, the remedy was through the appellate courts of the state and by writ of error to the United States court after the final disposition of the case in the state court and not by removal. The court in that case says: "The conduct of a criminal trial in a state court cannot be reviewed by this court, *unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to them by that instrument.* Mere error in administering the criminal laws of a state or in the conduct of a criminal trial—no federal right being invaded or denied—is beyond the reviewing power of this court under the statutes regulating its jurisdiction: "clearly recognizing the right of review in the United States court

where there is a federal right being invaded or denied, or where the accused is deprived of some right or immunity secured to him by the Constitution—which we claim is the case as shown by the
287 testimony on the motion to quash the indictment and the special venire. Any irregularity or conduct in the trial of a criminal cause whereby the accused is deprived of a Constitutional right or immunity, whether intentional or unintentional, is a violation of the Constitution for which the accused may complain. The mere fact that the jury commissioners conducted the selection of grand and petit jurors in such a way or under such a system as to discriminate against the negro race because of their race and color, whether intentional or unintentional, would constitute a discrimination under the Constitution, and, as shown in this case, we believe that the court should have sustained appellant's second and third assignments of errors. The cases of Andrews *v.* Swarts, 156 U. S. R., 272, and Burgman *v.* Backer, 157 U. S. R., 655, cited by the court in the opinion affirming this case, are not in point, both being *habeas corpus* proceedings where the federal question was sought to be raised after a trial judgment and conviction in that manner and not by writ of error and are wholly unlike the same at bar.

4th.

The court erred in overruling the appellant's fourth assignment of error in this, that the court has clearly failed to understand the contention of the appellant as to his application for first continuance, materiality of the evidence sought and the diligence used by the appellant as shown by the opinion of the court, wherein the court says: "that the trial of the case was begun on January 19, 1905, and that process for the witnesses named in the application was issued on December 13th, 1905, and that the return on the process shows that the same was made on the 20th of December, 1905, but that no further steps were taken by the appellant to secure the attend-
288 ance of said witnesses," whereas the record shows that process was issued for said witnesses on the 13th, day of December, 1905, and the same was returned on December 20th, 1905, and the cause was called for trial on December 21st, 1905, and no opportunity was given to the appellant to make any further effort to secure the attendance of the said witnesses on that date. The trial of the cause was begun on December 21st, 1905, and the same finished and verdict rendered on December 23rd, 1905, which, in our judgment, shows that the appellant exercised all reasonable diligence and all that could have been expected of him at the time and was a sufficient basis for the first application for continuance. The court, as indicated by its opinion, is clearly in error as to the materiality of the testimony of the absent witnesses Ann Thomas and Elijah Robbins. The court concluding and stating that it was immaterial as to whether or not the appellant passed the deceased before or after they had passed his house. The theory and only theory of the state was that the appellant passed the deceased and his companion before they had reached Clemeal Thomas' house, and, being insulted and en-

raged at them for the insult, rode hurriedly on to his own house and secured his shot gun and went on north in advance of the deceased and his companion and was lying in wait for them and shot them from ambush when they approached. It was a very material point in the case and the defendant's contention was that he never saw the deceased and his companion until after he had been to his house and procured his shot gun and was on his way to a neighbor's after a wedge, as indicated in the testimony, when the deceased and his companion came up behind him and attacked him and he ran from them into the woods where he remained for some time, and when he came out and started up the road, he unexpectedly came upon them again at the side of the road, when the altercation occurred in which they were slain; and we contend that it was very material in view of the contention of the state, to show that appellant did not go to his house and secure his gun for the purpose of slaying the deceased as
289 claimed by the state, and as showing the motive, and for this reason we think the court was in error as to the facts, the diligence and the materiality as shown by the application for a continuance, and that the court should have sustained this assignment of error.

6th.

The court erred in overruling the appellant's sixth assignment of error, complaining of the action of the trial court in admitting the testimony of John Eads as to the statements and alleged dying declaration of the deceased John Blair as shown by the bill of exceptions in this, that the court bases its decision and opinion upon one sentence of the testimony of the witness Eads and from that sentence or statement alone concludes that the deceased Blair, just prior to making the alleged statement, declared that he was going to die and could not live, and, upon that as a predicate, the court overrules this assignment of the appellant and sustains the action of the lower court in admit-ing the testimony of the said Eads; whereas the testimony of the said witness John Eads, taken altogether, both on the examination before the admission of the testimony and his cross examination after the admission of the testimony, shows that the deceased simply said, that he did not think he would get well. The language of the witness being—"he just simply said he didn't think he would get well"—"well, he told me he didn't think he would live, he said he didn't think he would live, that the wound was hurting him." He did not say—"he thought he was going to die that night or any thing of the kind"; and this was after his having stated only a few hours before that he thought he was getting along all right. The testimony establishing the predicate in this case does not come within the rule laid down by the authorities cited by the court in its opinion; the facts and language in each of said cases being entirely different, and, in our judgment, the ruling of the court on
290 this assignment of error was not sustained either by the testimony or the authorities, cited by the court.

7th.

The court erred in overruling the appellant's seventh assignment of error, complaining of the charge of the court in the several paragraphs thereof as indicated in the assignment, for the reason, that each of said objections to the charge given by the court should have been sustained and said cause reversed and remanded because of the errors in the charge of the court pointed out by appellant in said seventh assignment and each paragraph thereof. And for the further re-son that the court wholly overlooked and disregarded the objections made to the charge of the court in said assignment in paragraphs (*i*), (*j*), (*k*) and (*l*), as indicated in said assignment and in the original brief filed by appellant herein; that said objections to the charge of the court, as indicated in said paragraphs, should have been sustained under the authorities cited in appellant's original brief, and especially under paragraph (*l*) of said assignment with reference to the court's charge on self-defence as indicated therein.

8th.

That the court should have sustained the appellant's eighth assignment of erorr, which is as follows: "That the court erred in overruling defendant's motion for new trial for the reasons assigned and set forth in said motion"; because it appears from said motion and the record in said cause that the appellant was deprived of his rights and immunities and denies the equal protection of the
291 law under the Constitution of the United States on account of his race, color and previous condition of servitude and was illegally discriminated against in the conduct and trial of said cause in the trial court because of his color, race and previous condition of servitude and the prejudice existing in the country wher-in he was tried on account of his color. And for the further reason that said motion should have been sustained because of the other errors committed in the trial of said cause prejudicial to the rights of the appellant as shown by the record, and because the verdict of the jury was contrary to law and not supported by the evidence in that it failed to establish beyond a reasonable doubt that the defendant was guilty of the offense charged in the indictment, and that the same was rendered against him without sufficient evidence because of his race, color and previous condition of servitude.

9th.

Because said cause should have been reversed and remanded by this court for the reason that it appears from the record that the appellant was not given a fair and impartial trial under the law on account of his race, color and previous condition of servitude and was deprived of immunities, rights and privileges to which he was entitled under the Constitution and Laws of the United States and State of Texas, because of his race, color and previous condition of servitude, and was illegally discriminated against in the drawing and empaneling of the grand jury by which he was indicted and in the drawing and empaneling of the petit jury by which he was tried

and convicted, and in the conduct and trial of said cause in the trial court on account of his race, color and previous condition of servitude in violation of Article XIV of the Constitution of the United States as indicated by the appellant's assignment of error and shown by the record.

292 Appellant states that the counsel representing the opposite side of this cause are J. E. Yantis and J. B. Brockman, and *his* place of residence is in the city of Houston, Harris County, Texas, and he prays that said counsel be served with notice of this motion in accordance with law and rules of this court, and that on the hearing hereof said cause be reversed and remanded.

NOAH ALLEN,
Attorney for Appellant.

Endorsed: Marcellus Thomas *vs.* The State of Texas. Motion for Rehearing. Filed in Court of Criminal Appeals at Austin, Texas, May 10th, 1906. E. P. Smith, Clerk.

Order Submitting Motion for Rehearing.

WEDNESDAY MORNING, *June 6th*, 1906.

No. 3166.

MARCELLUS THOMAS
vs.
THE STATE OF TEXAS.

Appeal from Harris County.

Submitted on Motion for Rehearing by Appellant.

Judgment Overruling Motion for Rehearing.

WEDNESDAY MORNING, *June 27th*, 1906.

No. 3166.

MARCELLUS THOMAS
vs.
THE STATE OF TEXAS.

Appeal from Harris County.

This cause came on to be heard on the Motion submitted by Appellant for a rehearing and the same being considered by the Court is overruled.

293 *Petition for Writ of Error and Order Granting Writ.*

No. 3166.

MARCELLUS THOMAS
vs.
THE STATE OF TEXAS.

5th Assignment.

To the Honorable Court of Criminal Appeals of the State of Texas:

The appellant herein, Marcellus Thomas a citizen of the State of Texas and of the United States, comes and petitions this Honorable Court to grant him a writ of error herein, whereby he may have his case removed, appealed or transferred to the Supreme Court of the United States for the examination and review of the errors apparent upon the face of the record herein, in which there was an adverse*d* decision to certain rights, privileges, and immunities claimed by him under the first section of the 14th amendment to the constitution of the United States. In the event the Court should refuse to grant the writ of error then he prays that the Court may enter an order herein directing the clerk of this court to furnish this appellant with a copy of the record in this cause, so that he may be enabled to prosecute his appeal to the Supreme Court of the United States by applying to some one of the judges thereof for a writ of error herein. Appellant presents the following grounds and reasons upon which he bases this application, to-wit:

First. That the appellant is a person of color and of African descent, known as a negro, and was tried and convicted for the crime of murder, and the death penalty was assessed against him in the court below, which judgment was affirmed in this court on the 25th day of April, 1906.

Second. That in the court before which he was tried, only one member of his race and color was allowed to sit upon the grand jury which found and presented the indictment against him, and no member of his race or color was allowed to serve upon the
294 petit jury which tried and convicted him, and no members of his race or color were drawn upon the special venire from which the petit jury was to be drawn, that was to try him, and that did try and convict him but were excluded therefrom because of their race and color, and for no other reason, and the members of his race were excluded and have been practically excluded from serving on any jury in that court for a great many years, which was a violation by the State of Texas in his trial of the first section of the fourteenth amendment to the Constitution of the United States, and a denial to him of the equal protection of the laws.

Third. Because when appellant presented his motion to quash the indictment against him and his motion to quash the special venire of jurors drawn in his case on account of the exclusion of

members of his race from the grand jury and from the special venire of petit jurors because of their race and color and upon both motions offered certain legal and proper evidence to prove the allegations of said motions and said trial court refused to permit appellant to introduce said evidence, but overruled and excluded the same.

Fourth. Because the appellant was not given a fair and impartial trial under the law on account of his race, color and previous condition of servitude and was deprived of immunities, rights, and privileges to which he was entitled under the constitution and laws of the United States and the State of Texas, because of his race, color and previous condition of servitude, and was illegally discriminated against in drawing and impaneling the grand jury by which he was indicted and in the drawing and impaneling of the petit jury by which he was tried and convicted, and in the conduct and trial of said cause in the trial court on account of his race, color and previous condition of servitude in violation of the Constitution of the United States.

Fifth. Because this court is the highest court of the State in Criminal matters in which a decision in this case can be had, and that this court on the said 25th day of April, 1906, rendered a final judgment herein, deciding adversely to the rights of the appellant
295 claimed under the Constitution and laws of the United States and did on the 27th day of June, 1906, overrule and deny the appellant's motion for a rehearing in said cause, whereby said judgment became absolute and said appellant has no further remedy or opportunity to have said cause reëxamined and passed upon by any court of the State.

Sixth. Because manifest injustice has been done the appellant in the record, conduct and proceedings in said cause and in the rendition of the judgment against him, by assessing the death penalty, as well as the adverse rulings and decision affecting his rights claimed under the Constitution of the United States.

Wherefore appellant prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States. And if the writ of error be disallowed then for an order to the clerk of this court to furnish appellant with a copy of the record of this case as provided by law.

NOAH ALLEN,
Att'y for Marcellus Thomas, Appellant.

The writ of error prayed for is granted. The clerk of this court at Austin, Texas, will make out and deliver to the plaintiff in error a correct transcript of the papers in the case on demand of said plaintiff in error, upon his compliance with the laws and practice governing such cases. And it is further ordered that upon the filing of this petition and order with the clerk of this court at Austin, Texas, the sentence and judgment of this court and of the trial court heretofore pronounced herein, be and the same, in all things, is hereby suspended, pending and until the final hearing upon this writ of error by the Supreme Court of the United States, and the clerk of

this court will cause a copy of this order to be sent immediately to the Criminal District Court of Harris County, Texas.

W. L. DAVIDSON,
Presiding Judge.

296 Endorsed: No. 3166. Marcellus Thomas, Plff. in Error, *vs.* The State of Texas, Deft. in Error. Petition for Writ of Error. Filed in Court of Criminal Appeals at Austin, Texas, August 28th, 1906 E. P. Smith, Clerk.

Assignment of Errors.

In the Court of Criminal Appeals of the State of Texas.

MARCELLUS THOMAS, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Assignment of Error.

Now comes the said plaintiff in error by his attorney and makes the following assignment of error to the rulings and proceedings of the court below, upon which he relies, and expects to obtain a reversal in the Supreme Court of the United States, to-wit:

First Assignment of Error.

Because the court of criminal appeals should have reversed the case, because of the error of the trial in excluding from the jury, testimony offered on the trial tending to show that negroes were excluded from voting in the primary elections of the dominant party as shown by plaintiff in error's bill of exceptions and first assignment of error filed in the lower court and in defendant's motion for a new trial, because said testimony was proper and legal testimony tending to show race prejudice and the sentiment against the negroes existing in the county of Harris where the defendant was tried, which was calculated to and did influence the court in selecting white men only for jury commissioners and cause the discrimination against the negro-s or person- of African descent in the selection of jurors by the commissioners and the exclusion of negroes from jury service on account of their race, color and previous condition of servitude.

Second Assignment of Error.

297 Because the court of criminal appeals should have reversed the case, because of error of the trial court in overruling the defendant's motion to quash the indictment and to quash the special venire and list of petit jurors drawn in his case. Said motion being based on the ground that the court appointed only white men as jury commissioners to draw the grand and petit jurors for said court and excluding negroes and persons of African descent from

service as jury commissioners in said court, because of their race, color and previous condition of servitude and upon the further ground that the commissioners appointed to select the grand jurors which indicted the defendant and the special venire and list of jurors from which the panel was drawn which tried the plaintiff in error, discriminated against negroes and persons of African descent in the selection of said grand jurors and petit jurors because of their race, color and previous condition of servitude and excluded therefrom practically all persons of color or of African descent known as negroes, because of their race, and color, and that the said grand jury was composed of white persons only with one exception and the petit jurors and the special venires and list of persons drawn by said jury commissioners from which the jury was selected which tried plaintiff in error was composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent known as negroes, although they constituted about one-fourth of the population and of the qualified jurors of said county, were excluded therefrom on account of their race, and color, and had been so excluded from serving in said criminal district court of Harris county as jury commissioners and grand and petit jurors for years past and discriminated against in the selection of grand and petit jurors, because of their color, race and previous condition of servitude, which said discrimination was and is a denial to plaintiff in error of the equal protection of the law, and of the civil rights guaranteed by the constitution and laws of the United States; to which the ruling of the court, the plaintiff in error duly excepted which exceptions appear in the record of the case.

298 Third Assignment of Error.

Because the court of criminal appeals should have reversed the case, because of the error of the trial court in refusing to sustain the defendant's or plaintiff in error's motion to quash the indictment and special venire because of the discrimination against this plaintiff in error in the selection of the grand jury that found the indictment against him and the special venire list of jurors from which the panel was drawn that tried him, in attempting to limit and restrict the number of negroes or persons of African descent drawn and to be placed upon the grand and petit jury in said criminal district court of Harris county and the grand and petit juries in his case and in attempting to pro rate the same between the person- of the white race and persons of the colored race on account of their race, color and previous condition of servitude as shown by the testimony in the record in this case and as found by the court of criminal appeals in its opinion rendered herein.

Fourth Assignment of Error.

Because the court of criminal appeals should have reversed the case, because of the error of the trial court in refusing to sustain the motion for a new trial therein for the reasons set forth in said motion for a new trial, because it appears from said motion and the record

in said cause that the plaintiff in error was deprived of his rights, privileges and immunities and denied the equal protection of the law under the constitution of the United States on account of his race, color and previous condition of servitude, and was illegally discriminated against in the conduct and trial of said cause in the trial court, because of his color, race and previous condition of servitude and the prejudice existing against him in the county wherein he was tried, on account of his race, and color.

Fifth Assignment of Error.

Because the court of criminal appeals should have reversed the case and awarded plaintiff in error a new trial, because it appears from the record that the plaintiff in error herein was not given a fair and impartial trial, under the law on account of his race, color and previous condition of servitude and was deprived of immunities,
299 rights and privileges to which he was entitled under the constitution and laws of the United States and of the State of Texas because of his race, color and previous condition of servitude and was illegally discriminated against in the conduct of the trial of his cause and in impaneling the grand jury by which he was indicted and in drawing and impaneling the petit jury by which he was tried and convicted on account of his race, color and previous condition of servitude in violation of Article 14 of the Constitution of the United States as shown by the record and the assignment of error filed in the trial court; to which action of court in each particular herein alleged, the plaintiff in error excepted as appears in the record of the case.

Whereupon the plaintiff in error prays that the judgment and sentence of the said trial court and said court of criminal appeals of the State of Texas be reversed and held naught.

NOAH ALLEN,
Attorney for Marcellus Thomas, Plaintiff in Error.

Endorsed: No. 3166. Marcellus Thomas, Pl'ff in Error, *vs.* The State of Texas, Def't in Error. Assignment of Errors. Filed in Court of Criminal Appeals at Austin, Texas, August 28th, 1906. E. P. Smith, Clerk.

300 *Certificate.*

THE STATE OF TEXAS:

I, E. P. Smith, clerk of the court of criminal appeals of the State of Texas at Austin, do hereby certify that the foregoing two hundred and ninety-nine pages contain a true and correct copy of the proceedings had in court of criminal appeals of the State of Texas in cause No. 3166, Marcellus Thomas, appellant, *vs.* The State of Texas, appellee, from Harris County, as the same now appears of record and on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court this the 12th day of September, A. D. 1906.

[Seal Court of Criminal Appeals of Texas.]

E. P. SMITH,
Clerk of the Court of Criminal Appeals
of the State of Texas, at Austin.

301 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Court of Criminal Appeals for the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Criminal Appeals before you, or some of you, between Marcellus Thomas, plaintiff in error, and the State of Texas, defendant in error, a manifest error hath happened, to the great damage of the said Marcellus Thomas, plaintiff in error, as by his complainant appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of August in the year of our Lord one thousand nine hundred and six.

[Seal of the U. S. Circuit Court, Western Dist. Texas. Austin.]

D. H. HART,
Clerk of the Circuit Court,
U. S. West. D. Tex.,
By A. B. COFFEE, *Deputy.*

Allowed this, the 27 day of August 1906.

W. L. DAVIDSON,
Pres. Judge C't Crim. Appeals.

[Endorsed:] No. 3166. Marcellus Thomas Pl'ff in Error *vs.* The State of Texas Def't in Error. Writ of Error. Filed in Court of Criminal Appeals at Austin, Texas, August 28, 1906. E. P. Smith, clerk.

302 THE UNITED STATES OF AMERICA:

The President of the United States to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the Court of Criminal Appeals of the State of Texas, at Austin, Texas in the cause wherein Marcellus Thomas, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Presiding Judge of the Court of Criminal Appeals of the State of Texas, this 25th day of August in the year of our Lord one thousand nine hundred and six.

Signed this, the 27 day of August 1906.

[Seal of the U. S. Circuit Court, Western Dist. Texas. Austin.]

W. L. DAVIDSON,
Pres. Judge C't Crim. Appeals.

[Endorsed:] No. 3166. Marcellus Thomas, Pl'ff in Error, *vs.* The State of Texas, Def't in Error. Citation. Marshal's Return. Filed in Court of Criminal Appeals at Austin, Texas, August 28th 1906. E. P. Smith, clerk.

AUSTIN, *Aug. 28th,* 1906.

Service accepted of the within Citation.

R. V. DAVIDSON,
Attorney General of Texas.

Endorsed on cover: File No. 20,373. Texas court of criminal appeals. Term No. 105. Marcellus Thomas, plaintiff in error, *vs.* The State of Texas. Filed September 26, 1906. File No. 20,373.

8

Office Supreme Court, U. S.
FILED.
DEC 14 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted].6

MARCELLUS THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

MOTION FOR EXTENSION OF TIME IN WHICH TO PRINT RECORD.

Now comes the plaintiff in error in the above entitled and numbered cause and moves the court to grant him an extension of time in which to have the record in said case printed, as required by the rules of the court, for the following reasons, viz:

Because the plaintiff in error is charged and stands convicted and sentenced to death in said cause, and has been and still is confined in prison and is unable to assist himself in raising the funds necessary to prosecute his defense, and is and has been compelled to rely upon his relatives and friends to raise the money necessary to pay for printing said record, and has been led to believe that said money would be raised; that by reason of his poverty he has no means with which to pay the same; that he is informed that, because of the poverty and inability of his relatives and friends, who are all poor people and dependent upon manual labor, they

have been unable to raise said money before this time, but that if an extension of sixty days is granted him in which to raise said money the same will be raised and deposited with the clerk of this court, as required, for the printing of said record.

NOAH ALLEN,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 105.

MARCELLUS THOMAS, *Plaintiff in Error,*

vs.

THE STATE OF TEXAS, *Defendant in Error.*

STATE OF TEXAS, *Cameron County, ss:*

Affidavit on Motion for Extension.

Noah Allen, being duly sworn upon his oath says that he is and has been the attorney for the plaintiff in error in the above entitled and numbered cause from its inception, and has had full charge of said case and knows the condition and circumstances of said plaintiff in error; that plaintiff is a poor man, without property or means with which to make his defense in this case; that he has been compelled to rely upon his aged mother and two brothers to assist him in securing means with which to pay his counsel and other expenses of said defense; that the mother and

other relatives had no property or money with which to make said defense, save and except a small piece of land in Harris county, Texas, of the approximate value of eight hundred dollars; that on account of the defective condition of the title to said property the same was not in a condition to realize upon the same until within the past two or three months, when this affiant was negotiating for and had about completed arrangements to secure the money upon or out of said land necessary to pay for printing the record in this court, as required by the rules thereof, when the recent financial flurry and the consequent money stringency and the refusal of the banks to pay out any money excepting in small sums prevented the consummation of said arrangements and made it impossible since that time to secure said money.

Affiant further says that said land has been turned over to him for the purpose of securing money to defray the expenses of this cause, and that in his opinion he will be able to secure the estimated costs of the printing, viz., a balance of four hundred and fifty dollars, and have the same deposited with the clerk of this court, if the motion for an extension of sixty days' time in which to print said record is granted the plaintiff in error; that affiant has personally undertaken to raise said money and has assurances that he can secure same within the extension asked, and will give his personal assurance that the same will be secured and deposited with the clerk of this court within the sixty days' extension of time, if granted as prayed for.

Affiant further states that this motion for an extension of time in which to have the record in this cause printed is made in good faith and not merely for delay, but that justice may be done in the premises.

NOAH ALLEN,
Attorney for Plaintiff in Error.

Subscribed and sworn to before me, this 9th day of December, 1907.

[Seal Notary Public, County of Cameron, Texas.]

R. B. CREAGER,
Notary Public in and for Cameron County, Texas.

[Endorsed:] 105, 20373. No. 105, October Term, 1907. Marcellus Thomas, plaintiff in error, *vs.* The State of Texas, defendant in error. Motion and affidavit for extension of time to print record. Noah Allen, attorney for plaintiff in error.

[Endorsed:] File No. 20,373. Supreme Court U. S., October Term, 1907. Term No. 105. Marcellus Thomas, pl'ff in error, *vs.* The State of Texas. Motion for extension of time within which to print record. Filed Dec. 14th, 1907.

Supreme Court, U. S.
FILED.
MAR 26 1908
JAMES H. McKENNEY,
CLERK.

No. 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

MARCELLUS THOMAS,
Plaintiff in Error

VERSUS

THE STATE OF TEXAS,
Defendant in Error

In Error to the Court of Criminal Appeals of the State of Texas.

BRIEF OF PLAINTIFF IN ERROR.

NOAH ALLEN,
ATTORNEY FOR PLAINTIFF IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

MARCELLUS THOMAS, *Plaintiff in error,*

vs. | No. 105.

THE STATE OF TEXAS, *Defendant in Error.*

Brief of Counsel for Plaintiff in Error.

Statement of the Case.

Marcellus Thomas, the plaintiff in error, a citizen of African descent, was indicted on October 26, 1905 in the Criminal District Court of Harris County, Texas, for the killing of John Blair, a white man. The grand jury which returned the indictment was impaneled on October 3, 1905, and the offense for which the plaintiff in error was indicted was committed after the impaneling of the grand jury, on October 9th. The offense being committed after the impaneling of the grand jury, the plaintiff in error, as a matter of course, was not given an opportunity to challenge the formation of the grand jury. The facts in this respect are the same in this case as in the case of Carter vs. Texas, 177 U. S. 442 (See Indictment R. 1 and testimony of J. W. Haskins R. 9.)

On December 21, 1905 and before the arraignment and trial, the plaintiff in error filed his separate motions to quash the indictment and special venire drawn in such cause,

which motions were duly sworn to, and alleged discrimination against him on account of his race, color and previous condition of servitude, whereby he was denied the equal protection of the laws, and of his civil rights, as guaranteed by the Constitution and laws of the United States. The allegations in each of said motions were substantially as follows:

"That Harris County has a population of about seventy-five thousand, one fourth of whom are negroes or persons of African descent; that the voting population of Harris county is approximately twelve thousand, about four thousand of whom are negroes or persons of African descent, and about one fourth of the qualified jury commissioners in said county are negroes or persons of African descent; and about one fourth of the qualified jurors of the county are negroes or persons belonging to the colored race, that the prejudice and ill feeling of the white race towards the negroes in said county is so strong that the dominant political party, through whose primary elections all county and local elective officers are nominated and elected, excludes and prohibits negroes from participating in or voting at its party primaries for the nomination of its party candidates, and have so excluded them for several years; that there are three civil district courts and one criminal district court, and one county court in Harris county, in each of which a jury commission, consisting of three persons, is appointed at each term thereof by the presiding judges in said courts, whose duties are to select the persons to serve as jurors in said courts; that owing to the prejudice existing in the minds of the white people of the county against the negroes, it has been for years considered objectionable to select or appoint a negro as a jury commissioner, in any of said courts, and because of the race prejudice against them no negroes have been appointed as jury commissioners in any one of said courts for a long period of years last past; that because of the racial prejudice existing in said county against the negroes, no persons of African descent were selected by the jury commissioners to serve as jurors in any one of the said courts prior to the year 1900, for many years; that since that period and for four or five years past, the jury commissioners, while not absolutely excluding all negroes or persons of African descent from serving on the grand and petit juries in the Criminal District Court, where this case was tried, have wilfully and illegally discriminated against the colored race by purposely refusing to put all negroes or persons of African descent, on the list of persons drawn and selected by said jury commissioners to serve as grand and petit jurors in said court at the various terms thereof, as the same were drawn or found, and in the selection of said lists have intentionally left them off of said lists and excluded them from such service, because of their race, color and previous condition of servitude, only placing not to exceed one negro on the grand jury, composed of twelve persons at any one time, as a ruse or pretense of fair treatment to the colored race, and excluding all other negroes drawn from said grand jury because of their color, notwithstanding, that, practically one fourth of all of the persons in said county, qualified to serve as grand jurors, are n[illegible]roes; that because of the race prejudice and ill feeling against the negroes in Harris County, and against this defendant in particular, on account of his color and race, and because of the sentiment against placing negroes, or persons of color, or of African descent upon the grand juries and petit juries in said county, and especially in said criminal district court, as hereinbefore stated, the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro, or person of African descent and of the same race and color of this defendant, upon said grand jury so finding and presenting said indictment against this defendant, notwithstanding the fact that one fourth of the qualified grand jurors of said county are negroes, or persons of African descent, and this defendant has been and was thereby discriminated against on account of his race, color and previous condition of servitude, and was then and thereby denied the equal protection of the laws and of his civil rights, as guaranteed by the Constitution and laws of the United States." R. 68—71.

By agreement and consent of the Court, evidence was heard upon the two motions at the same time, and considered by the Court upon each, the same as if said motions had been heard separately.

Upon considering the evidence upon the hearing of said motions, the same were each overruled by the Court, to which rulings upon each of said motions, the plaintiff in error then and there duly excepted. R 32

A trial was thereafter had, resulting in a verdict of guilty of murder in the first degree, and the sentence of death. (R.2)

A motion for a new trial having been filed and overruled, the cause was appealed to the Court of Criminal Appeals-the Court of last resort for criminal cases in Texas. The Court of Criminal Appeals having affirmed the judgment of the trial Court, and on June 27th 1906 overruled a motion for a rehearing in said court, the same is brought to this court by a writ of error.

At every step in the proceedings in the State Courts, the plaintiff in error has presented in proper form and urged the Federal questions presented by the motions to quash the indictment and special venire, and the State Court of last resort for such causes has passed upon and decided said questions adversely to the plaintiff in error, as will be seen by reference to his assignment of errors in the State Court (R. 79) and his assignment of error therein, and the same are now properly before this Court for its consideration and determination:

Federal Questions Presented

The general principle is well settled that whenever by any action of a state, whether through its legislature, courts, executive or administrative officers ALL, persons of the African race are excluded, solely because of race and color, from serving as grand or petit jurors in the criminal prosecution of a person of that race, the equal protection of the laws is denied to him, contrary to the 14th Amendment.

Strauder v. West Va. 100 U. S. 303.

Va. v. Rives, 100 U. S. 313.
Ex parte Va. 100 U. S. 344.
Neal vs. Delaware 103 U. S. 370.
Gibson vs. Miss. 162 U. S. 565.
Carter vs. Texas 177 U. S. 442.
Martin vs. Texas 200 U. S. 316.

It is equally as well settled by this Court that a mixed jury, some of which shall be of the same race with the accused cannot be demanded as of right in any case, nor is a jury of that character guaranteed by the 14th Amendment.

Va. vs. Rives supra
Neal vs. Delaware supra
Martin vs. Texas supra

That the accused IS ENTITLED TO DEMAND, under the Constitution of the United, States that in organizing the grand jury, as well as impanelling the petit jury, there shall be NO EXCLUSION of his race, and NO DISCRIMINATION against them because of their race or color, is conclusively settled by the decisions:

Va. vs. Rives supra
in re Wood, 140 U. S. 278-285.
Martin vs. Texas, supra.

There is no contention in this case that the laws of Texas, under which jurors are selected, are in themselves discriminating, and in violation of the Constitution. Neither do we contend that there was absolute exclusion of ALL negroes or persons of African descent by the jury commissioners in the selection of the grand and petit juries, who returned the indictment and tried the plaintiff in error, but we do contend most sincerely that there was such EXCLUSION of persons, because of their race, and such DISCRIMINATION practiced against them because of their race and color, in the selection of said juries, as to constitute a violation of the Constitution and a deprivation of the rights and immunities guaranteed to the plaintiff in error under the constitution and laws of the United States, within the rule laid down by the authorities above cited.

The record in this case discloses a different state of facts from any that have ever come before this Court, so far as we can find from the recorded cases, and the questions presented will require the marking of new lines, and the fixing of more definite rules, whereby we can determine how far the officers of the law in the state courts can juggle with the constitution in the selection of jurors and the trial of persons of African descent and not violate the constitutional guarantee of protection against race discrimination.

No definite rule with reference to any particular state of facts, showing an attempt on the part of the officers of the state to comply with the letter of the law, while utterly disregarding its spirit, in the selection of grand and petit jurors, has been established, defining their limits and it was well remarked by one of the judges of the Court of Criminal Appeals, while this case was under consideration in that court, that this record presents a good case in which the Supreme Court of the United Stated should lay down some definite rules governing such questions. We shall therefore present the several questions raised on the motions presented in the trial court, and the rulings of the state courts thereon, and set out in our assignments of error in this Court, confidently believing that this Court will, upon review of this cause, enunciate such a rule, governing the practice in the state courts in matters of this character, as will secure citizens of African descent, charged with crime in the state courts, against race discrimination, and take away ALL POSSIBILITY OF OPPRESSION BY LAW, because of race or color, in keeping with the declared purposes of the Amendments to the Constitution as announced in this Court in exparte Virginia, supra.

First Assignment Of Error

"Because the Court of Criminal Appeals should have reversed the case, because of the error of the trial Court in excluding from the jury testimony offered on the trial, tending to show that negroes were excluded from voting in the primary elections of the dominant party, as shown by

plaintiff in error's bill of exceptions, and first assignment of error, filed in the lower court, and in defendant's motion for a new trial; because said testimony was proper and legal testimony, showing race prejudice and the sentiment against the negroes existing in the county of Harris, where the defendant was tried, which was calculated to, and did influence the court in selecting white men only for jury commissioners, and caused the discrimination against the negroes or persons of African descent in the selection of jurors by the commissioners and the exclusion of negroes from jury service on account of their race, color and previous condition of servitude." R. 230

Under this assignment, plaintiff desires to call the Court's attention to the following question propounded to the witness A. R. Anderson, Sheriff of Harris County (R.10):

Q. I will ask you if you are not acquainted with the custom of the dominant political party in this County for the past eight or ten years, with reference to the admission of negroes, or persons of African descent to participate in its primary elections?" And the following offer made after objection interposed by counsel for state:

"We offer to make the proof so as to get it in the record. We offer to show by this witness that the dominant party in which candidates are nominated, selected and elected have for years past excluded negroes, or person of African descent from participating in their primary elections for nomination of such officers."

This testimony which was offered on the hearing of the motions to quash the indictment and special venire was objected to by the State, which objection was sustained by the Court and said testimony excluded, and the ruling of the Court thereon was duly excepted to by the plaintiff in error. The Court of Criminal Appeals, in considering this assignment of error passed the same over as with a wave of the hand, saying—"The Court admitted some testimony on this line, but subsequenty rejected further testimony. However, we understand that the proof introduced simply showed that the negroes, if they were Democrats, were allowed to vote in the primary. but not otherwise. Negroes were not actually excluded because they were negroes, but because they were

Republicans. It does not occur to us that if appellant could have proven what he stated he expected to prove, this testimony could be regarded as material." R. 214, 216.

The very fact that the Court admitted some testimony, which was contradictory, and from which the Court of Criminal Appeals assumes that negroes were only excluded from participating in the primaries of the Democratic party because they were Republicans, and not because of their race, is a sufficient reason why the trial court should have permitted plaintiff in error to introduce other and satisfactory evidence upon that question. He should not have been confined to the testimony of two witnesses, one saying negroes were excluded because of their race and color, the other saying they were excluded because of their party affiliations. If appellant could have proven by the witness Anderson, and other witnesses, as we offered to prove, that the negroes were excluded from participation in the party primaries of the dominant political party of the County in the nomination and selection of candidates for county offices, we maintain that he should have been permitted to do so for the reason that such testimony tended to show, and would have, in fact, shown that the race prejudice was strong in Harris County, and that it was so strong that men who were elected to offices in that county, first having been nominated by a party primary or convention, from which negroes, because of their race, were excluded, after having been elected, would hesitate to recognize the negro race by the appointment of citizens of that race upon jury commissions, and in the selection of grand and petit jurors.

We insist that this testimony was competent and material for the purpose of showing the extent of the race prejudice existing in that community, and for this reason we believe the trial court was in error in excluding the same, and that the Court of Criminal Appeals was in error in affirming the action of trial court.

Second Assignment of Error.

"Because the Court of Criminal Appeals should have

reversed the case because of the error of the trial court in overruling the defendant's motion to quash the indictment and to quash the special venire and list of petit jurors drawn in his case; said motion being based on the ground that the Court appointed only white men as jury commissioners, to draw the grand and petit juries for said court, excluding negroes and persons of African descent from service as jury commissioners in said court, because of their race, color and previous condition of servitude, and upon the further ground that the commisssioners appointed to select the grand jurors which indicted the defendant, and special venire list of jurors, from which the panel was drawn, which tried the plaintiff in error, discriminated against negroes and persons of African descent in the selection of said grand jurors and petit jurors, because of their race, color and previous condition of servitude, and excluded therefrom practically all persons of color or of African descent, known as negroes, because of their race and color, and that the said grand jury was composed of white persons only, with one exception, and the petit jurors and special venire and list of persons drawn by said jury commissioners, from which the jury was selected, which tried the plaintiff in error, was composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although they constituted about one fourth of the population and of the qualified jurors of said county, were excluded therefrom on account of their race and color, and had been so excluded from serving in said criminal district court of Harris County as jury commissioners and grand and petit jurors for years past; and discriminated against in the selection of grand and petit jurors because of their race, color and previous condition of servitude, which said discrimination was and is a denial to plaintiff in error of the equal protection of the law, and of the civil rights guaranted by the constitution and laws of the United States; to which ruling of the Court the plaintiff in error duly excepted, which exceptions appear in the record of the case." R. 231.

Under this and other subsequent assignments, we shall present several distinct propositions which arise in consideration of the motions to quash the indictment and special venire list filed in the trial court. The facts in this case with reference to the organization of the grand jury, the commission of the offense, and the finding of the indictment, being the same as in the Carter case, supra, there can be no question about the right of the plaintiff in error to file his motion to quash the indictment at any time before arraigment and plea.

The evidence upon the motion to quash the indictment and the motion to quash the special venire, being the same, the questions arising upon the two motions will be considered together, and what we shall have to say with reference to one, shall, so far as applicable, be considered and applied to both. Many of the allegations in the motions are established by the testimony beyond question, and not even denied by the State. No formal written denial of any of the allegations in either motion was filed by the State, but the same were treated as having been denied, and testimony was heard accordingly. It is alleged in said motions, and supported by the testimony of Sheriff A. R. Anderson (R. 16) and H. Albrecht (R. 17), and not denied, that there are in Harris County three Civil District Courts, one Criminal District Court and one County Court, in all of which three jury commissioners are appointed by the judge of each court respectively, at each term of the respective courts, whose duties are to select juries for the succeeding term of court, and that there are six terms of each of said courts each year, and in the Civil District Courts four jury weeks in each term, for which a special panel of jurors is drawn for each week separately, and in the Criminal District Court there is drawn a grand jury for each term, and a special panel of petit jurors, consisting of from 36 to 50 jurors, for each week of each term; that there has never been a negro appointed as jury commissioner in any one of said courts by the judges thereof, at any term of said courts; that there have never been any negroes drawn as jurors in any one of said Civil District Courts in said County,

at any term thereof, for the past ten or fifteen years; that prior to the decision of the Seth Carter case (Carter vs. Texas 177 U. S. 442.) and the Whitney case, decided by the Court of Criminal Appeals of Texas November 21, 1900, 59 S. W. 895, no negroes had ever been drawn on the grand or petit juries in the Criminal District Court of Harris County; that subsequent to the decision of the Whitney case, there has never been, with but one or two exceptions, more than one negro on the grand jury, and more than one negro on each panel of from 36 to 50 for each week of each term of the Criminal District Court, with possibly two or three exceptions, when there were as many as two on the panel for the week, and once only as many as three; that as a general rule there has been one, and one only, negro put on the grand jury at each term of said court, since the Whitney case, and as a general rule, though with some exceptions, there has been one negroe selected on the panel of from 36 to 50 petit jurors for each week of each term since 1900, or the decision in the Whitney case.

The evidence further establishes the fact, beyond any question, that the population of Harris County was from 75,000 to 90,000, and that about one fourth of that population consists of negroes or persons of African descent; that from one fifth to one fourth of the qualified voters of Harris County were negroes (R. 28); that from one fifth to one fourth of the qualified jurors of Harris County were negroes; that in Harris County there was a large number of persons of African descent, engaged in various lines of business and in different business enterprises; that there were a number of negro schools; negro school teachers, in the country as well as in the city of Houston, a large number of negro churches and negro preachers, and negro secret organizations, with four newspapers published by negroes, a number of negro lawyers, negro real estate dealers, negro merchants, negro printers, negro barbers, negro doctors and negro insurance men (R. 35, 38, 41, 44 and 45).

The testimony also establishes the fact that there were

two indictments against the plaintiff in error, growing out of the same transaction, and the killing of two men at the same time, both of which were returned by the same grand jury, set for trial on the same day, and in each of which a special venire was drawn returnable on the same day, one in the case now under consideration, for seventy-five venire men and the other in the other case [being No. 14134 on the docket of said Court] in which sixty veniremen were drawn; that upon neither of these two special venires, from which jurors were to be drawn to try the plaintiff in error, was there to be found a single negro juryman. [See testimony of A. R. Anderson R. 14--16 and testimony of C. E. Smith R. 49].

The absolute exclusion of ALL negroes from the juries in all of the courts of Harris County, before the Carter and Whitney decisions, and the regularity with which only one negro has been placed upon each grand jury and one upon each weekly panel of the petit juries in the criminal district court since said decisions, suggests very strongly the idea that there has been a studied effort to keep clean the outside of the court of justice, while on the inside there is the rankest evasion of the spirit of the constitution and unbridled discrimination against citizens of African descent, because of their race and color. Instead of trying to obey the law and the constitution, the object seems to have been to find away how NOT TO DO IT. The first step was—

Discrimination In The Appointment Of Jury Commissioners

Art. 3145 of the Revised Statutes of Texas reads:

"The District Court of each county shall, at each term thereof, appoint three persons to perform the duties of jury commissioners for said court, who shall possess the following qualifications:

1st. They shall be intelligent citizens of the county and able to read and write.

2nd. They shall be qualified jurors and free holders of the county.

3d. They shall be residents of different portions of the county

4th. They shall have no suit in such court, which requires the intervention of a jury."

Art. 3146 Ibid. as Amended in 1905 reads.

"The same person shall not act as a jury commissioner more than one in the same year."

Art. 3139 ibid. as Amended in 1905. reads:

"No person shall be qualified as a juror, who does not possess the following qualifications:

1st. He must be a citizen of the State and of the County in which he is to serve, and qualified under the constitution and laws to vote in said county, provided that his failure to pay poll tax, as required by law, shall not be held to disqualify him for jury service in any instance.

2nd. He must be a freeholder within the state and a house holder within the county.

3d. He must be of sound mind and good moral character.

4th. He must be able to read and write, except in cases provided for in the succeeding articles.

5th. He must not have served as a juror for six days in the District Court, or during the preceding three months in the county court.

6th. He must not have been convicted of a felony.

7th. He must not be under indictment or legal accusation of theft or of felony."

One of the grounds alleged in the motions of the plaintiff in error to quash the indictment and special venire is the alleged discrimination against the colored race in the failure or refusal of the Judge of the Criminal District Court, in which the plaintiff in error was indicted and tried, to appoint some of the jury commissioners in said court from the citizens of African descent. The right to such an appointment from the colored race and the importance of the same becomes very apparent when we consider the fact that the want of personal knowledge on the part of the white jury commissioners as to whom were and who were not qualified jurors among the negroes in the county, is taken advantage of and used by them as an excuse for not selecting and placing more negroes upon the grand and petit juries. All of the jury commissioners appointed by the court being white, and consequently not associating with, and having a personal knowledge of the moral, intellectual, educational and other qualifications of the colored citizens, they are prone to act upon their preconceived ideas and prejudices, and conclude that the negroes did not represent the best moral character and fitness and that ninty-nine per cent of them were not qualified for jurors and leave them off, of the jury for that reason, as jury

commissioner Rothwell testified on the hearing of these motions, was done in this instance. (R. 24.)

The testimony of Messrs. Rothwell and Parker (R. 20-25,) the jury commissioners who served in drawing the lists of grand and petit jurors for the term of court at which plaintiff in error was indicted and tried shows that in selecting jurors they confined their selection from the colored race, mainly, to such, only, as they knew personally, while such was not the case with the white jurors selected by them.

A qualified and competent negro, who possessed the necessary intelligence and moral character, required for jury commissioners under the statutes, would be much more likely to know the character, fitness and qualifications of the negroes of the county, than the white men, and would be more disposed to deal fairly and impartially with the men of his own race than the white jury commissioners.

The record in this case clearly shows that there were hundreds of colored citizens, capable and qualified, from every standpoint, residing in the county, from whom to select jury commissioners.

The fact that certain persons are exempt from jury duty under the law, does not justify the court in assuming that negroes who would make good jury commissioners would claim such exemptions, if such exemptions would apply to jury commissioners, which is not the case. The law nowhere provides any exemptions from service as jury commissioners. The provisions of the law requiring jury commissioners to be drawn from different parts of the county indicates that the intention of the legislature was that men should be drawn, who would have a general knowledge of the entire citizenship of the county, and as a personal knowledge seems to have been the basis of operation for the jury commissioners in selecting jurors, fairness to the colored citizenship of the county, which was, according to the evidence, about one fourth of the entire population, required at least one of their number,

who knew that population, in order to give them proper treatment and representation in selecting juries in the courts, which are expected to administer justice fairly and impartially to all alike.

In view of the undisputed fact that no negro has ever been appointed as jury commissioner in any of the civil courts of the county, and that no negroes have been drawn upon the juries for the respective civil courts, and the further fact that the judge of the Criminal District Court, where the plaintiff in error was indicted, tried and convicted, has never appointed a negro as jury commissioner, but has taken judicial notice of the existence of race prejudice by instructing the jury commissioners not to discriminate against the negro race and where they "found GOOD PEOPLE, who are qualified under the laws of the state, to select them irrespective of race and color; that IN CASE they were of the COLORED RACE, IT WOULD TEND TO MAKE THEM BETTER citizens," (R.51,) we can only conclude that the failure on the part of the judge to select any negroes as jury commissioners, was in keeping with the prevailing sentiment of the county against their selection for jury commissioners or jurors. The very fact that he has never at any time appointed a negro as a jury commissioner, but has at each term of his court appointed three white jury commissioners; notwithstanding the fact that the evidence shows that there were a large number of negroes qualified for such service, coupled with the fact that the judge himself takes judicial knowledge of, and recognizes the feeling in the community against the negro race, raises a strong presumption that negroes were not appointed jury commissioners by the judge, because of their race, color and previous condition of servitude. The mere statement of the judge that he does not discriminate against the negroes, as a race, does not rebut that presumption, in the face of all of the circumstances and facts that contradict his statement. It is not to be presumed that the trial judge, whose sworn duty it is to administer the law fairly and impartially to all, would

boldly admit that he had wilfully discriminated against the negro race in the selection of jury commissioners, in violation of the Constitution and laws of the United States, for which he would be subject to a fine or imprisonment.

A guilty conscience sometimes invents many plausible excuses and give expression to the strongest protestations of innocence.

There is but one reasonable conclusion to be reached in this connection, and that is that the judge alway appointed WHITE men as jury commissioners because he DID NOT WANT TO APPOINT NEGROES. He evidently labored under the belief that there were no "GOOD PEOPLE WHO WERE QUALIFIED," among the negroes, simply because they were negroes, or he would have appointed some of them in order to "make them better citizens" as he instructed his jury commissioners to do. They were not appointed because they belonged to the negro race, which was a violation of the Constitution, and a denial of equal rights and immunities under the law. In discussing these questions this court, in exparte Virginia 100 U. S. 344, said:

"One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away ALL POSSIBILITY of oppression by law because of race or color."

In Strauder V. West Virginia, supra, this Court said:

"The Fourteeth Amendment secures, among other civil rights to colored men, when charged with criminal offenses against a state, an impartial jury trial by jurors INDIFFERENTLY selected, or chosen WITHOUT DISCRIMINATION against such jurors, because of their color."

If the jurors by which an accused negro is to be tried are to be INDIFFERENTLY selected, or chosen WITHOUT DISCRIMINATION, the jury commissioners who are to select them SHOULD BE INDIFFERENTLY chosen WITHOUT DISCRIMINATION, that they be liberal and fair minded and NOT FOLLOW THE EXAMPLE OF THE JUDGE who appoints them, in never selecting a member of the colored race.

The second step in finding how to evade the law and

trample under foot the constitutional guarantee against race prejudice, and continue the oppression by law is:

Discrimination in the use of Poll Tax List in Drawing Jurors.

Art. 3154 Revised Statutes of Texas reads:

"It shall be the duty of the county clerk or other legal custodian of the same, to furnish the jury commissioners with the last ASSESSMENT ROLL of the county."

It is a right to which every colored man is entitled, that IN THE SELECTION OF JURORS to pass on his life, liberty or property, there shall be NO EXCLUSION of his race, and NO DISCRIMINATION against them because of their color.

Va. vs. Rives 100 U. S. 313.

Martin vs. Texas, 200 U. S. 316.

Mr. Webster defines "Discriminate"—to distinguish, to observe the difference between, to separate, to select from others, to make a distinction between, to mark with notes of difference, to distinguish by some note or mark; distinguished, having the difference marked.

He defines "DISCRIMINATION" as the act of distinguishing; the act of making or observing a difference, distinction, the state of being distinguished; mark of distinction.

The evidence discloses the fact that the ASSESSMENT ROLL or TAX ROLL and the POLL TAX LIST were both before the jury commissioners, while selecting grand and petit jurors. The assessment or tax roll does not indicate the race or color of the citizens, while the POLL TAX LIST did indicate their color, as will be seen by the last answer of Tax Collector Glass, on page 30 of this record. Other testimony also shows the same fact. The presence and use of THE POLL TAX LIST, which shows who were colored and who were white citizens, making the distinction between the races, was, of itself a discrimination, and a strong circumstance tending to show a wiful discrimination against the negro race by the jury commissioners. The law above quoted required the delivery of "ASSESSMENT" or TAX roll, which does not indicate the race or color to the commissioners, and

not the POLL TAX LIST, which did show it. The poll-tax list was illegally before, and used by the jury commissioners. There should have been no marks of distinction between the races used by the jury commissioners in selection of jurors.

Another step in the development of the plan to make the constitutional protection, supposed to have been thrown around the colored race, of no effect, and to do by indirect methods what the legislature of Texas could not do by direct legislation was

Discrimination in the Manner of Selecting Grand and Petit Jurors by the Jury Commissioners.

The following articles from the Statutes of Texas will clearly show the method provided by the laws of the state, by which grand and petit iurors are to be drawn and selected:

Art. 3151, Revised Statutes of Texas reads:

"When the jury commissioners shall have been sworn and organized, the judge shall proceed to instruct them as to their duties, and shall designate to them for what weeks they shall select petit jurors and the number of jurors selected for each week."

Art. 3152 Ibid. reads:

"Jury commissioners shall retire in charge of the Sheriff or Constable, to some suitable apartment, and shall be kept free from the intrusion of any person during their session, and shall not separate without leave of the court, until they have completed the duties required of them."

Art. 3158 Ibid. reads:

"The jury commissioners shall select from the citizens of the different portions of the county, liable to serve as jurors, one hundred persons, or a greater or less number, if so directed by the Court, free from all legal exceptions, of good moral character, of sound judgment, well informed, and so far as practicable, able to read and write, to serve as petit jurors at the next term, if in the District Court, and for the next six months, if in the County Court, and shall write the names of such persons upon separate pieces of paper, as near the same size and appearance as may be, and fold the same so that the names cannot be seen."

Art. 3159 Ibid, reads:

"The names of the persons so written and folded shall be deposit-

ed in a box, and after being well shaken and mixed, the commissioner shall draw therefrom the names, one by one, of thirty-six persons, or a greater or less number, where the judge has so directed, for each week of the term of the District Court or terms of the County Court, for which a jury may be required, and shall record such names as they are drawn, upon as many separate sheets of paper as there are weeks of such term or terms for which juries will be required."

Art. 3159 "A" (Act 1905) Supplement to Sales Civil Statutes 1906, page 302; reads:

"The jury commissioners shall thereupon select one man for every hundred of population in any county, or a greater or less number if so directed by the Court, and this shall constitute a special venire list, from which shall be drawn the names of those who shall answer summons to the special venire facias, after the petit jurors for the term have been drawn on any venire one time during such term, and the drawing of the veniremen from the special venire list shall be drawn in the same manner as prescribed for other jurors; and no citizen who has served as a petit juror for one week, during any term of court, shall during said term be compelled to answer more than one special venire facias; nor shall any citizen be compelled to answer a summons to a special venire facias more than once during any one term of court, provided that the provisions of this act shall not apply to any counties having a population of less than two thousand inhabitants."

Art. 377 of the Code of Criminal Procedure of Texas reads:

"The jury commissioners shall select from the citizens of the different portions of the county sixteen persons to be summoned as grand jurors for the next term of the District Court."

Art. 378 Ibid, reads:

"No person shall be selected or serve as a grand juror, who does not possess the following qualifications:

1st. He must be a citizen of the State and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county.

2nd. He must be a freeholder within the State and a householder within the county.

3rd. He must be of sound mind and good moral character.

4th. He must be able to read and write.

5th. He must not have been convicted of any felony.

7th. He must not be under indictment or other legal accusation of theft of any felony."

As before stated herein, Art. 3154 of the Revised Statutes provides that the jury commissioners shall be

furnished with the last ASSESSMENT ROLL of the county, AND NOT THE POLL TAX LIST, for their use in the selection of jurors.

Art. 3158 provides that the jury commissioners shall select from the citizens of the different portions of the county the number of jurors directed to be drawn by the Court, and SHALL WRITE THE NAMES OF SUCH PERSONS ON SEPARATE PIECES OF PAPER, AS NEAR THE SAME SIZE AND APPEARANCE AS MAY BE, AND FOLD THE SAME SO THAT THE NAMES CANNOT BE SEEN.

Art. 3159 provides that the names of the persons so written and folded, as directed in Art. 3158, SHALL BE DEPOSITED IN A BOX which shall be used for that purpose, and AFTER BEING WELL SHAKEN AND MIXED, the comissioners shall draw THEREFROM the names ONE BY ONE of 36 persons or a greater or less number as the judge has directed for each week of the term of the court for which a jury is required, and SHALL RECORD such names, AS THEY ARE DRAWN upon as many separate sheets of paper as there are weeks of such term or terms for which juries will be required.

Art. 3159 "A" provides for the drawing of a special venire list in the same way. While the statute does not expressly state that the grand jurors shall be drawn in exactly the same way that other jurors are drawn, the fact that the law specifically provides how names shall be drawn to serve on juries from different portions of the county for the several weeks of the different terms of the court, by analogy and force of reasoning, we must conclude that the direction in Art. 377 of the Code of Criminal Procedure, to the jury commissioners to select from citizens of the different portions of the county sixteen persons to be summoned as grand jurors for the next term of the court, means that these sixteen persons shall be drawn by the commissioners the same as other jurors are drawn under other provisions of the law regulating and directing the manner of selecting jurors. Starting with this presumption, we will see at once from an examination of the testimony in this record, that

the jury commissioners have wholly ignored the provisions of the law in the selection of persons to serve upon grand juries, and that the selection of the members of the grand jury for the term at which, and the grand jury by which, the indictment was found and returned against the plaintiff in error in this case, was drawn in entire disregard of the provisions of the law regulating the drawing of jurors. The evidence clearly shows that the commissioners drawing this grand jury, as well as the several panels of petit jurors, for the several weeks of the term of the court, were drawn without the use of the box, as directed in Art. 3159, and by the selection of a number of names of persons of African descent, and then, by agreement, placing one negro on the list of names drawn for grand jurors, and one negro on each list or panel of fifty petit jurors, drawn for each week of the term of the Criminal District Court, at which plaintiff in error was indicted, tried and convicted: If bunching the negroes, on a general view of the poll tax list, and then selecting—setting aside and picking out one of the bunch for the grand jury, and one for each panel of petit jurors, is drawing the grand or petit jury, without discrimination, in accordance with the provisions of the law, as above set out, then we must concede that the rulings of the trial court were correct, and our assignments of error are not well founded. On the other hand, if such conduct was in violation of the law, and a discrimination against the negro race, our assignments of error should have been sustained in the State Court, and a refusal to sustain the same by the Court of last resort of the State, should warrant a reversal by this court.

J. H. Rothwell, one of the jury commissioners who drew the grand jury and the petit jurors and special venire list for the term of court at which the plaintiff in error was indicted and tried; testified in substance, that, there was but one negro drawn for the grand jury and one for each panel of fifty petit jurors for each week of said term and ONLY ONE for each week; that, "we had so many to draw from who had never served before, and WE HAD TO PUT AT LEAST ONE

NEGRO ON ACCORDING TO LAW; sometimes we considered two, or more; we never put more than one for any one week, WE HAD MORE WHITE MEN WE WANTED ON; we just took the whole batch together—what we had on hand; we considered a number. We dont know how many; but we agreed to put one on the petit jury; No! we did not have any box; we took them from the list—the POLL TAX LIST, and the tax roll; we considered we had to put some on; if the negroes had represented the best intelligence, and the best moral character and fitness we would have put more of them on." (R. 21-24-25).

Mr. J. L. PARKER, another one of the commissioners who drew the grand jury and the petit juries for that Term, of the Court, testified, that, there were fifty jurors drawn for each week of the term—200 in all; that they got the names from the "POLL TAX LIST" AND TAX ROLL.

In answer to the question—"Did you consider the question as to whether any negroes were drawn or not?" He said—"The judge charged us not to discriminate against the negro."

In answer to the question "That is how you happened to put some on, is it?" He said "NOT IN PARTICULAR; where we found a good man we put him on, wherever we thought he was qualified."

In answer to the question—"Did the list indicate whether they were white or colored?" he said "Yes, sir."

In answer to the question—"Did you consider white and colored along together' as a matter of fact?" He said—"WELL, WHERE THEY WERE KNOWN, WE DID." (R. 25-26.)

The testimony of these two witnesses is the only direct testimony, showing how the lists of jurors were drawn, which composed the grand jury and the panels of the petit jury for the several weeks of the term, and the special venire list drawn under the law. Under the provisions of Art. 3152, they were supposed to be in a room to themselves, where no one was allowed to enter, while they were performing their duties as jury commissioners, and no one else but the jury commissioners themselves could legally have

any knowledge of the actual drawing of the jurors, or the manner in which they were drawn, and their testimony corroborated as it is by all of the facts and circumstances shown in this case, should be conclusive proof of the charges of discrimination, as alleged in the motions to quash the indictment and special venire. One of these witnessess, Mr. Parker, seemed to have a very indistinct recollection of just how they proceeded and what they did, and his answer to the question—"That is how you happened to put some on, is it?" wherein he said "NOT IN PARTICULAR" carries with it at least a mental reservation on his part, and a strong indication to the mind of any fairminded person of the fact that it was because of the charge of the judge that they did put some negroes on the list, and the further answer to the question—"Did you consider white and colored along together, as a matter of fact?"—"Well, where they were known, we did." indicates very clearly the disposition of the commissioners to avoid putting on any more negroes than they were compelled to put on, or what they thought they were compelled to put on, under the law.

The testimony of Commissioner Rothwell was a little more frank and open, before the attorney for the State got hold of him on cross examination, and he very plainly said "We had to put at least one negro on according to law." "Yes, sir, one for each week;" "We had more white men that we wanted on." (R. 21)

This testimony clearly shows, and is not contradicted, that no regard was paid to the statutory requirements for the selection of jurors in any particulars, and that instead of following the provisions of Arts. 3158 and 3159 of the Statutes of Texas, and writing the names of each person drawn upon separate sheets of paper, as near the same size and appearance as may be, and folding the same so that the names could not be seen, and depositing them in a box, and well shaking and mixing and drawing them from said box, one by one, and RECORDING SUCH NAMES AS THEY WERE DRAWN upon as many separate sheets of paper as there were

weeks of the term for which juries were drawn, as the law required, they used no box at all, and did not record such names as they were drawn, upon separate sheets of paper, as required by law, but simply looked over the POLL TAX LIST and the tax roll, learning from the poll tax list the color of the citizen, as it was indicated thereon, and selecting a number of names in a batch or group—agreed to set them apart, one negro to fifteen grand jurors, and one negro to 49 petit jurors, thus violating the law in the the manner of the drawing, and in limiting the number of negroes upon the list of grand jurors and upon each panel of petit jurors to one, by agreement.

This placing of one negro on the grand jury, and one and upon each panel of 50 petit jurors, in the ratio of one to sixteen grand jurors and one to fifty petit jurors, for a period of years, as has been practiced in this court, could not have happened by accident or as a mere coincidence for each term of said Court for the past five or six years, if the law had been followed, and the names written upon slips of paper, and folded so that they could not be seen, and deposited in the box, the box well shaken, and names well mixed, and drawn from the box as the law directs. The pretense that placing one negro on the list of sixteen names for grand jurors and one to fifty on the panel of petit jurors for each week of the term, and of each term for years past, is nothing more nor less than a sham and a ruse to cover up the evasions of the law and the short-comings and intentional discriminations against the negro race by the officers of the Court.

It is true that the jury commissioners and officers of the Court all by word of mouth deny that they have intentionally discriminated against the negro, but the actual facts as shown by the testimony, and the absence of negroes on the grand and petit juries, and the manner in which the number was limited by agreement between the commissioners, all contradict their denials. The presumption is against them, unrebutted. Jury commissioners who would wilfully violate the law, or purposely seek a way to evade its pro-

visions, would as a matter of course hesitate to admit their guilt or avow their intention to do what the law forbids. Most naturally their testimony would be evasive or their answers positive denials of incriminating facts, and efforts to excuse or explain away their questionable conduct.

Protestations of innocence frequently become evidence of guilt, and methinks the jury comissioners protest too much in this case.

Third Assignment of Error.

"Because the Court of Criminal Appeals should have reversed the case, because of the error of the trial court in refusing to sustain the defendant's or plaintiff in error's motion to quash the indictment and special venire because of the discrimination against this plaintiff in error in the selection of the grand jury that found the indictment against him and the special venire and list of jurors from which the panel was drawn that tried him, in attempting to limit and restrict the number of negroes or persons of African descent drawn and to be placed upon the grand and petit jury in said criminal district court of Harris county and the grand and petit juries in his case and in attempting to pro rate the same between persons—of the white race and persons of the colored race on account of their race, color and previous condition of servitude as shown by the testimony in the record in this case and as found by the court of criminal appeals in its opinion rendered herein." (R. 231)

Under this assignment we shall direct your attention specially to the particular question of prorating and thereby limiting the number of negroes to be placed upon the grand and petit juries.

The Court of Criminal Appeals in affirming the judgement of the trial court said:

"It will be seen from the record that with them, it was a matter of difficulty to determine on the basis of a pro rata representation as between the whites and negroes, what pro rata of negroes were qualified as jurors. While it might be a discrimination against the negroes, even in the adoption of the pro rata, yet we think that is ordinarily a good test. We are not prepared to say that, considering the testimony as to the negroes qualified, and the evidence regarding exemptions—the jury commissioners did not in the selection of both the grand and petit jurors allow the negro race their pro rata of qualified jurors. That in one—twelfth on the grand jury and about the same per cent on the petit jury." (R. 215.)

This is a frank admission by the court of last resort of the State, that the jury commissioners attempted to pro

rate the representation upon the grand and petit juries between whites and negroes, and in the opinion of the court, guessed at about the right basis of representation, that is one to twelve. Even upon the theory that a pro rata basis, could be legally adopted in selecting jurors, the evidence shows that the negroes were not given their full representation on the petit juries if one-twelfth was their proper per cent on the grand jury, for they only received an allotment of one to fifty, on the panels drawn for petit jurors and none at all on the special venire of seventy-five. When the Court of Criminal Appeals reached the conclusion that the jury commissioners attempted to pro rate the representation between the negroes and the whites, evidently, it was "ALMOST PERSUADED" to accept the views contended for, by the plaintiff in error and should have gone further and held that there was discrimination.

To Pro Rate is to Discriminate.

Under the system of selecting jurors prescribed by the legislature of Texas, which requires the jury commissioners to select the names and write them upon separate pieces of paper as near the same size and appearance as may be, and fold the same, so that the names cannot be seen, and deposit them in a box from which the panel each week is to be drawn, after the same has been well shaken and mixed, it is impossible for the commissioners to draw between the whites and negroes on the basis of one to twelve, one to sixteen or sixteen to one, or any other basis, and thus have secured one on the grand jury and one on the panel of petit jurors for each week of each term of said court for the past five or six years, for the names could not be seen and race determined, until after each name was drawn, and the law required them to record the list AS DRAWN from the box. Whatever may have been the relative number of qualified negroes to the qualified white jurors in Harris County, that relative number would not, in the ordinary course of events, be drawn from a list of names placed in a box, well shaken and mixed and drawn out one at a time so

as to carry out that relative proportion on each list of sixteen, thirty-six, or fifty, or any other number, for the six terms of court in each year for five or six years, or for the sixteen grand jurors and four panels of fifty petit jurors, for the four weeks of the term of court at which plaintiff in error was indicted and tried as was done in this case. Naturally some lists, of whatever number they might be composed, would contain more negroes than others, while some would not have a single one. Mr. Rothwell, said: "we had more white men we wanted on", "we considered a number, don't know how many. BUT we AGREED to put one on the petit jury." "We considered one for the grand and one for the jury each week." It would be impossible to draw a jury according to law and prorate, the members of each panel between the whites and negroes, without racial discrimination as the term "discrimination" is defined by all authorities. The record in this case shows that there has been only only one negro placed on the regular panel of jurors for each week of each term of the court in which the plaintiff in error was tried for several years past, with but few exceptions. There being only one exception, where there were as many as three negroes on the panel and only two or three occasions where there were two, and there is no pretense that the evidence showsthat more than one was ever placed upon the grand jury for years past and the uncontradicted testimony of Commissioner Rothwell, is that there was only one negro placed on each panel of fifty, for the term of court, at which plaintiff in error was indicted and tried.

To pro rate is to proportion, to adjust, according to the comparative relation of one thing to another, says Webster; hence to pro rate the negroes and whites in selecting jurors is to make a distinction between the races and pick out, select and set aside, one number or portion of one race and another number or portion from the other race according to the comparative relation one race bears to the other. When this comparison is drawn, relation

establised and the proportion determined, limitation is thereby fixed, which, necessarily excludes all in excess of the limit or proportionate number agreed upon. When, the basis, proportion or limit is fixed on account of race or color, the exclusion that must necessarily follow is also on account of race or color. It is immaterial what the percentage or basis is, upon which the ratio is fixed and the proportion established and agreed upon, so long as there is a ratio fixed and determined which is to govern and be followed by the commissioners in the selection of jurors. When the ratio or proportion is once fixed whether by express agreement or silent assent, if it is based upon race or color and the jury commissioners attempt to draw the color line in the selection of grand and petit jurors according to such ratio, or limit their number in keeping with said ratio, because of their race and color, it would undoubtedly constitute race discrimination in violation of the Constitution of the United States. Under the constitutional guarantee of equal rights, the jury commissioners have no more right to pro rate the negro representation and limit their number on the grand and petit juries, than they have to pro rate and limit the number of Englishmen, Irishmen, Germans, Mexicans, Sweeds, Italians, or Americans, according to their respective numbers in the county in which they live. With the box used as provided by law, the jury commissioners could not avoid getting more than one negro on the list for some weeks and none for other weeks and hence these jury commissioners who claimed to be following the instructions of the judge, agree to divide up, set apart, and apportion the negroes, one to the grand jury and one to each panel of fifty petit jurors for each week of the term and discard the box and legal methods of selecting jurors and adopt a novel plan of their own.

Should the Legislature of Texas enact a law providing that the jury commissioners should be furnished with the tax roll and poll tax lists upon which should be some mark of distinction showing who were negroes and who were

white citizens and that from such lists they should determine the number of white and colored citizens and the number of qualified white and colored jurors respectively and from them select the names for grand and petit jurors from each race in the proportion that they bear to each other and pro rate the members of each grand jury and each panel of petit jurors between the white and negro citizens according to the number of qualified jurors of each race, it would not be maintained for a moment, by any court or reputable lawyer, that such a law was valid and could be enforced in any case wherein a citizen of African descent was on trial for an offense against the laws of the State. Its absurdity and unconstitutionality would be apparent at a glance. It is equally as obsurd to maintain that the officers of the court can do by indirect methods without legislation, that which the Legislature of the State could not do by direct enacment, without violating the constitution. The Court of Criminal Appeals, virtually found upon the facts, that there was an effort to pro rate the representation on the ground and petit juries, between the whites and the negroes and practically held that such pro rating was a discrimination against the negro race, but, it attempted to excuse such discrimination on the ground, that, in the opinion of the court, that was ordinarily a good test, by which to determine how many negroes should be placed upon the juries in Texas.

Fortunately for the negro race, the Amendments to the Federal Constitution and the decisions of the courts construing and defining the purposes of the same, make no provisions for determining how many negroes shall be placed upon the juries, in cases where their rights are involved, but, on the contrary they denounce any attempt to draw the color line IN ANY MANNER WHAT EVER in the selection of jurors. No test, as to how MANY or how ANY negroes are to be put on or kept from the juries, is necessary. The Amendments to the Constitution were adopted to prevent the evil consequences to the negro race and their oppression by law, that might grow out of any attempt to establish a

test by which the distinction between the races might be fixed and maintained, as said, in Rives—vs—Virginia, and the resort to any test, scheme or device, whereby there is an outward show of complying with letter of the Constitution and laws while wholly ignoring the spirit, should have met with the strong condemnation of the court of last resort, of the State, instead of its attempted excuse.

Fourth Assignment of Error.

"Because the court of criminal appeals should have reversed the case, because of the error of the trial court in refusing to sustain the motion for a new trial therein for the reasons set forth in said motion for a new trial, because it appears from said motion and the record in said cause that the plaintiff in error was deprived of his rights, privileges and immunities and denied the equal protection of the law under the constitution of the United States on account of his race, color and previous condition of servitude, and was illegally discriminated against in the conduct and trial of said cause in the trial court, because of his color, race and previous condition of servitude and the prejudice existing against him in the county wherein he was tried, on account of his race, and color." (R. 231.)

Fifth Assignment of Error.

"Because the court of criminal appeals should have reversed the case and awarded plaintiff in error a new trial, because it appears from the record that the plaintiff in error herein was not given a fair and impartial trial, under the law on account of his race, color and previous condition of servitude and was deprived of immunities, rights, and privileges to which he was entitled under the constitution and laws of the United States and the State of Texas because of his race, color and previous condition of servitude and was illegally discriminated against in the conduct of the trial of his case and in impaneling the grand jury by which he was indicted and in drawing and impaneling the petit jury by which he was tried and convicted on account of his race, color and previous condition of servitude in violation of Article 14 of the Constitution of the United States as shown by the record and the assignment of error in the trial court; to which action of court in each particular herein alleged, the plaintiff in error excepted as appears in the record of the case." (R. 231—232.)

The fourth and fifth assignments of error cover the same questions presented under former assignments, being framed, with particular reference to the motion for a new trial in the trial court and the preservation of the vital,

points and errors complained of, throughout the entire trial more as a precautionary measure in the matter of practice, than to present any new questions.

Just how far this court will go into an examination of the correctneas of a verdict in a case where, race discrimination is alleged and proven or attempted to be proven on any part of the case, is an open question. We are familiar with the general rule that only Federal questions will be considered in cases coming from the state courts, but where the poison of race prejudice and discrimination once becomes apparent in the trial of a citizen of African descent for his life and this court properly acquires jurisdiction of the case, it should have it for all purposes, and see whether or not the verdict of the jury is based upon sufficient evidence or is the result of such prejudice and race discrimination.

It is contended in the motion for a new trial that the verdict is not supported by the evidence (R. 62—7) and we respectfully invite your attention to the same without any discusssion, farther than to any that the testimony shows that the two men were shot, one on the right side and the other on the left which could not have been the case under the theory of the State, while it corroborates the statement of the plaintiff in error. The accused could not have been standing in ambush at the right side of the road and shot from that position wounding the two men as the evidence shows they were wounded. Taking all of the testimony together with the physical facts there can be but little doubt, that had the defendant been a white man, he would have been acquitted, or had the deceased been a negro the same result would have followed.

It is as impossible to keep race prejudice from entering the jury box and affecting the verdicts where the two races conflict as it is to keep the jury from breathing the air that surrounds them.

The correctness of the rulings of the state court upon questions of state law decisions and rules of practice, are properly state questions with which this court may not deal.

But when this court acquires jurisdiction of a case involving the life, liberty, or property of a citizen of the United States, in which the question of race prejudice, discrimination and oppression is involved, whatever there may be of these evils in the case at any of its stages, even to the findings of the jury, should be for the consideration of this court and its final determination. Should this court reach the conclusion upon a review of the evidence in this cause that the verdict of the jury was the result of or in any measure brought about through race prejudice and discrimination, then the judgement of the Court of Criminal Appeals of the State, should be reversed under the fourth and fifth asignments of error herein.

The vice of race discrimination having entered into the trial of a citizen of African descent, it permeates and enters into the entire proceedings, and if the plaintiff in error herein was not given a fair and impartial trial under the law, on account of his race, color and previous condition of servitude and was deprived of immunities, rights, and privileges to which he was entitled under the Constitution and laws of the United States, and the State of Texas, because of his race, color and previous condition of servitude and was illegally discriminated against in the trial of his case in any manner whatever, the judgement of the Court of Criminal Appeals of the State and of the trial court should be reversed.

In view of the absolute exclusion of all negroes from service as jury commissioners or jurors in any of the courts in Harris County, prior to 1900, and the decision in the Whitney case and the continued absolute exclusion of all negroes from service as jury commissioners and jurors in all of the Civil Courts of said county up to the trial of this cause and the failure of the judge of the Court in which plantiff in error was tried to appoint at any time a negro as a jury commissioner, and the recognition of the existence of race prejudice in the community by said judge and his taking judicial knowledge of the same by especial-

ly instructing the jury commissioners in relation thereto, and the action of the jury commissioners in placing only one negro upon the grand jury and one upon each panel of the petit jury for each term of said court since the decision of the Whitney case in 1900, which made it necessary to make a pretended showing of compliance with the law since that decision and the action of the jury commissioners in agreeing to place only one negro upon the grand jury and one upon each panel of fifty petit jurors for four weeks of the term of court at which the plaintiff in error was indited and tried, and not drawing a single negro upon the special venire of seventy-five in this case, and of sixty in other case and all of the testimony and circumstances shown by the record in this case, we think it was a violent presumption, which the state court indulged, that it was merely accidental and a mere irregularity that no negroes were drawn upon the special venire in this case and that the negro race was not intentionally or otherwise discriminated against in the selection of grand and petit jurors.

The action of those officers being the acts, of the state, and the refusal of the state court to redress the wrong by them committed, was a denial of a right to the prisoner by the Constitution and laws of the United States. (Neal-vs-Delaware, Supra).

In Exparte Virginia, it was said: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority his act is that of the State. This must be, or the constitutional prohibition has no meaning."

In Martin-vs-Texas, which we believe to be the last expression of this court upon this subject, it was said: "An accused is entitled to demand, under the Constitution of the United States, in organizing the grand jury as well as impanelling of the petit jury, that there should be no exclusion of his race and no discrimination against him, because of his color." It will be noticed that in this statement of the court there are two propositions; first, that there shall be no exclusion of his race; second, that there shall be NO DISCRIMINATION against them, because of their race or color.

We believe that the record in this case establishes both propositions beyond a reasonable doubt and calls for a decision from this court enforcing the rule above laid down, by a reversal of the judgement of the Court of Criminal Appeals of the State and enunciating a rule to be followed by the officers of the state courts in the selection of grand and petit jurors, which will prevent race discrimination and the evasions of the constitution by any means whatever. In Strauder—vs—Virginia, the court said: "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—their right to exemption from unfriendly legislature against them distinctively as colored,—exemption from legal discriminations implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy and discriminations which are steps towards reducing them to the condition of a subject race."

If this positive immunit[illegible]d these rights most valuable to the colored race are to be preserved and the spirit which gave birth to this constitutional guarantee is to be enforced for the protectien of the colored race, it becomes absolutely necessary for this court to recognize the present existence in certain localities of that same race prejudice, which this court said in the last case referred to was recognized by the framers of the Amendment and

without the apprehension of the existence of which, the Amendment would have been unnecessary, and adopt the most stringent safeguards and rules for the enforcement of the Amendments, in order to protect the negro race against the actions of officers of the courts and agents of the State who would deprive the negro race of their constitutional rights and leave them, without a ray of hope for the admininstration of justice to them in the courts of the land.

When the court of last resort of a state, referring to the Carter case, wherein race discrimination was an issue says, "we passed upon this exact question, and held that the court did not err in overruling the motion to quash the indictment. A writ of error was sued out to the Supreme Court of the United States and the decision in that case was reversed. We have had no occasion to change our views therein expressed, and were it an original proposition, would still adhere to our original opinion," (Smith—vs—State 42, Texas Criminal Reports 220) and it becomes so apparent that said court will only follow where this court leads, it is imperative for the negro race in said State to turn to the highest tribunal in the land, freed as it is, from the miasma of local race prejudice, for relief. It is equally as imperative upon this court, to which they are driven as a last resort, to lead the way and blaze out a path for the protection of the colored race under the Constitution and laws of the Nation, so plain, that the wayfaring man, though a judge, or jury commissioner, may not err therein.

Confidently trusting that the spirit of the Constitutional Amendment still lives and will be applied to the facts in this case and that the judgement of the State Courts will be reversed and the sentence of death entered against the plaintiff in error accordingly, set aside, because of race discrimination and error shown by the record herein, we most respectfully submit his cause for your final consideration.

NOAH ALLEN
Attorney for Plaintiff in Error

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 6.

MARCELLUS THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

MEMORANDUM OF ADDITIONAL AUTHORITIES FOR THE PLAINTIFF IN ERROR.

We desire to direct the attention of the court to two cases, both of which were decided about the time the brief for the plaintiff in error was being prepared, and which were not then reported.

The first of these cases is Farrow *vs.* State, reported in 45 Southern Reporter, at page 619, and which was decided by the Supreme Court of Mississippi on February 17, 1908.

The other case to which we desire to direct this court's attention is Montgomery *vs.* State, which is also reported in 45 Southern Reporter, page 879, and which was decided by the Supreme Court of Florida on February 12, 1908.

In the course of its opinion in the Montgomery case the Supreme Court of Florida said:

> "It is not contended that the statutes of this State under which the jurors were selected and summoned are violative of any constitutional provision; but it is urged that the action of the officers of the State in the execution or administration of the statutory provisions for selecting and summoning the jurors was such that citizens were discriminated against on account of race or color, and that thereby the State has denied the plaintiff in error the equal protection of the laws, in violation of the Constitution of the United States."

And further on in the same opinion it is said:

> "While the presumption is that the officers have legally discharged their duty in selecting and summoning the jurors under statutes that do not au-

thorize any illegal discrimination, yet this is but a presumption that may be overcome by evidence to the contrary."

Respectfully submitted,

NOAH ALLEN,
Attorney for Plaintiff in Error.

FREDERICK S. TYLER,
Of Counsel.

Supreme Court, U. S.
FILED.
OCT 13 1908
JAMES H. McKENNEY,
Clerk.

No. 6.

In the Supreme Court of the United States,

OCTOBER TERM, 1908.

MARCELLUS THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR THE STATE OF TEXAS.

ROBERT VANCE DAVIDSON,
Attorney General.
JAMES DUBOSE WALTHALL,
Assistant Attorney General.
For Defendant in Error.

VON BOECKMANN-JONES CO., PRINTERS, AUSTIN

437-1008-50

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 105.

MARCELLUS THOMAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR THE STATE OF TEXAS.

The question in this case is whether the plaintiff in error was indicted, tried and convicted in the State courts regularly and in due course of law, as prescribed by the laws of the State of Texas, and the Constitution and laws of the United States.

The claim which plaintiff in error sets up in asserting his right to the relief by this proceeding is that he, a citizen, and a person of color, was within the jurisdiction of the State of Texas by that State denied the equal protection of the laws thereof and of the civil rights guaranteed by the Constitution and laws of the United States; that his race was by the agents and officers of that State purposely discriminated against on account of their race and color, in the selection of the grand jury that found the indictment against him and the special venire and list of jurors from which the panel was drawn that tried him.

All of plaintiff in error's assignments of error raise but one question, and, therefore, we shall not attempt to consider them separately, but will submit several propositions in answer to them all.

THE RECORD IN THIS CAUSE DOES NOT SHOW THAT THERE IS ANY FEDERAL QUESTION INVOLVED, AND,

THEREFORE, THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DECISION OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS, AS TO WHETHER CITIZENS OF THE RACE TO WHICH PLAINTIFF IN ERROR BELONGS WERE, BECAUSE OF THEIR RACE, EXCLUDED FROM THE GRAND JURY THAT FOUND THE INDICTMENT AGAINST HIM, AND THE SPECIAL VENIRE FROM WHICH THE JURORS WERE DRAWN THAT TRIED HIM, IS A PURE QUESTION OF FACT, AND THIS COURT WILL NOT REVISE THE DECISION OF THE HIGHEST COURT OF THE STATE THEREON.

STATEMENT.

On December 21, 1905, and before arraignment and trial, the plaintiff in error filed his separate motions to quash the indictment and special venire drawn in this cause, which motions were sworn to, and alleged that "because of the race prejudice and ill feeling against the negroes in Harris county, and against this defendant in particular, on account of his color and race, and because of the sentiment against placing negroes, or persons of color, or of African descent, upon the grand juries and petit juries in said county * * * the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro, or person of African descent, and of the same race and color of this defendant upon said grand jury." (Record, pp. 68-70.) It was also alleged that "because of the race prejudice and ill feeling existing against the negroes or persons of African descent in Harris county, and against this defendant in particular, on account of his color and race, there were no negroes or persons of African descent upon the *venire* list of persons drawn to serve as jurors in this cause, and that the list of jurors drawn was composed exclusively of white persons, all negroes or persons of African descent having been intentionally excluded and left off of the special venire or list of jurors drawn in this cause by the jury commission because of their race and color." (Record, p. 73.) It was further alleged that one-fourth of the qualified jurors of Harris county were negroes, or persons of African descent. (Record, p. 73.) By agreement and consent of the court, evidence was heard upon the two motions

at the same time, and considered by the court upon each, the same as if said motions had been heard separately.

Upon considering the evidence upon the hearing of said motions, the same were each overruled by the court. (Record, p. 52.)

The testimony of the witnesses introduced upon said motions is set out in the record, pages 9 to 51, inclusive.

AUTHORITIES.

Western Union Tel. Co. vs. Call Publishing Co., 181 U. S., 203.
Israel vs. Arthur, 152 U. S., 355.
Dower vs. Richards, 151 U. S., 663.
Turner vs. New York, 168 U. S., 95.
Thayer vs. Spratt, 189 U. S., 353.
Egan vs. Hart, 165 U. S., 188.
Gleason vs. White, 199 U. S., 54.
Bartlett vs. Lockwood, 160 U. S., 357.
New Orleans Water Works Co. vs. Louisiana, 185 U. S., 336.

There is no contention in this case that the laws of Texas, under which grand and petit jurors are selected, are in themselves discriminating and in violation of the Constitution of the United States. It is admitted by plaintiff in error that neither the Constitution nor statutes of Texas prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the State, without regard to race, color or previous condition of servitude. Nor is there any claim made that the Constitution and laws of the State had, at the time this prosecution was instituted, been so interpreted by the courts of Texas as to prevent the enforcement of rights secured equally to all citizens of the United States, without regard to race or color. The only contention is that the jury commissioners in the selection of the grand and petit juries who returned the indictment and tried the plaintiff in error did in fact exclude therefrom negroes, or persons of African descent, because of their race and color. The trial court heard evidence upon this point, both for the defendant and for the prosecution, and upon consideration of same overruled the motions to quash the indictment and special venire. The action of the trial court in overruling said motions was reviewed by the Court of Criminal Appeals, the highest court of Texas in criminal

cases, and sustained. The overruling of said motions involved a pure question of fact, which will not be reviewed by this court upon writ of error.

In the case of Israel vs. Arthur, 152 U. S., 355, it is held that the Supreme Court of the United States has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise, if the question of fact were decided in a particular way. And this has been the position generally taken by the Federal Supreme Court. We respectfully submit that this court should not go behind the final judgment of the highest court of Texas in this case for the purpose of re-examining and weighing the evidence, and determining whether, upon the facts, there was error in overruling the motions to quash the indictment and special venire. Congress has provided that the final judgment of the highest court of a State in cases of which this court may take cognizance shall be re-examined upon writ of error, a process of common law origin, which removes nothing for re-examination but questions of law arising upon the record. (Chicago, Burlington & Quincy Ry. Co. vs. Chicago, 166 U. S., 246.)

In the case of Western Union Telegraph Company vs. Call Publishing Company, 181 U. S., 103, the Call Publishing Company instituted suit against the Western Union Telegraph Company to recover sums alleged to have been wrongfully charged and collected from it by defendant for telegraphic services rendered. It was alleged that the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called the *Lincoln Daily Call;* that the *Nebraska State Journal* was another newspaper published at the same time in the same city, by the State Journal Company; that each of these papers received Associated Press dispatches over the lines of defendant, and that the defendant wrongfully and unjustly discriminated against the plaintiff and in favor of defendant in the matter of rates charged for news service. The telegraph company denied any unjust discrimination. A trial in the district court resulted in a verdict and judgment for the plaintiff, which was affirmed by the Supreme Court of the State. In the opinion in the above case this court said:

"It is further insisted that even if there be a law which controls, there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testi-

mony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court."

In the case of New Orleans Water Works Company vs. Louisiana, 185 U. S., 336, there was a proceeding in the nature of a *quo warranto* in the name of the State to obtain a forfeiture of the charter of the defendant, the waterworks company. On the trial there was a judgment in favor of the company, but on appeal to the Supreme Court of the State that judgment was reversed and judgment in favor of the State and against the company was entered decreeing the forfeiture of the charter and all of the franchises of the defendant. In the petition of the Attorney General it was averred that the water company had been duly incorporated by the State Legislature, and that after its incorporation it had been guilty of repeated and continuous violations of the charter and had thereby forfeited the same and its franchises. It was alleged that the company had failed to supply the inhabitants of the city with pure water, and that the supply was wholly inadequate. It was also averred that the company had illegally exacted and collected greater rates than it was authorized to collect. In its answer, the water company averred that the State, as plaintiff, acted in bad faith in assailing its franchises, and also in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids a State to deprive any person of life, liberty or property without due process of law or to deny any person within its jurisdiction the equal protection of the law. The defendant in error made a motion to dismiss the writ of error on the ground of a lack of jurisdiction because no Federal question was disclosed in the record.

In granting the motion to dismiss, this court, speaking through Mr. Justice Peckham, said:

"The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the State courts, and in a proceeding to which the company was a party and after a full hearing has been accorded it in such proceeding. This

was due process of law, and no Federal question arises from the decision of the court.

"The same answer would seem to fit the other questions submitted by the plaintiff in error. They are all based upon the proposition that the judicial determination of these particular questions by the State tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the Federal Constitution, have been violated. *But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a State court.* * * *

"The State in this case has secured the forfeiture of the charter of the defendant by means of a judicial decree obtained in a State court which had jurisdiction to give the relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. *The facts upon which such forfeiture was based have been judicially declared and found, and the defendant has had full opportunity for its defense upon such hearing.* The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture because of a violation by defendant of the conditions of its charter, was implied in the very grant of the charter itself. The claim, therefore, that the forfeiture was a violation of the charter and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the State by such judgment had denied to defendant the equal protection of the laws, can not obtain. *Whether defendant had so violated its charter was a fact to be decided by the State court. That court had full jurisdiction over the parties and the subject matter, and its decision of the question was conclusive in this case so far as this court is concerned.*"

In the case of Mann vs. Rock Island Bank, 11 Wall., 652; 20:188, it is held that the Supreme Court will not undergo labor of finding truth from a mass of testimony, since it would be an obstruction to public justice, on account of delay which it interposes to hearing of other causes.

The record before the court in this case contains all the testimony introduced and evidence offered in the trial court upon the motions to quash the indictment and special venire, all of which was open for consideration and passed upon by the Court of Crim-

inal Appeals of the State of Texas (Marcellus Thomas vs. State, 95 S. W. Rep., 1069), and it is well settled that on error to the State court, this court can not re-examine the evidence and review its decision upon the ground that such decision was against the evidence or the weight of the evidence.

We have not lost sight of the fact that plaintiff in error reserved a bill of exceptions to the action of the trial court in refusing to admit testimony tending to show that negroes were excluded from voting in the Democratic primary, and that the Democrats elected the officers of the county, and these were instrumental in operating the machinery of the court which excluded negroes from serving on juries. The court admitted some testimony along this line, but subsequently rejected further testimony. (Record, pp. 29-30.) If plaintiff in error could have proven what he stated he expected to prove, it is difficult to understand how this testimony could be regarded as material. There is no claim that negroes were excluded from participating in the elections to select county officers, but merely that they were not allowed to vote in Democratic primaries. Even if it could be held that such exclusion amounted to a discrimination against them in the matter of suffrage, still it would not show nor tend to show that negroes were purposely excluded from the grand and petit juries in this case on account of their race and color.

THE TRIAL COURT HAVING PERMITTED PLAINTIFF IN ERROR TO INTRODUCE EVIDENCE AND OFFER PROOF IN SUPPORT OF HIS MOTION TO QUASH THE INDICTMENT AND SPECIAL VENIRE DRAWN IN HIS CASE, AND HAVING CONSIDERED SAID EVIDENCE AND OVERRULED THE MOTION UPON THE GROUND THAT NO DISCRIMINATION AGAINST HIM WAS SHOWN, AND THE COURT OF CRIMINAL APPEALS, THE HIGHEST COURT IN TEXAS IN CRIMINAL CASES, AFTER A FULL REVIEW OF THE TESTIMONY, HAVING DECIDED THAT THE TRIAL COURT ACTED PROPERLY IN OVERRULING SAID MOTION, SUCH RULING WILL NOT BE DISTURBED BY THE SUPREME COURT OF THE UNITED STATES UPON WRIT OF ERROR.

In the case of Barrington vs. Missouri, 205 U. S., 484, the plaintiff in error, before the trial of the cause commenced, applied

for a change of venue on the ground of local prejudice. Upon the hearing of the application forty-one witnesses testified in its support and thirty-seven in opposition thereto; and the trial court decided that prejudice justifying a change of venue had not been made out and denied the application. This court in dismissing the writ of error in the above case said:

"It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he was entitled. The State Supreme Court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and that 'where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as indicate an abuse of the discretion lodged in such court.' And the Supreme Court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary."

In the conduct of trial of causes in general, in selecting and impaneling the jury and in ruling on motions to quash indictments, the trial court necessarily exercises a discretion, and this court will not review its action where the highest court of the State has held that it acted properly. In its decision of this case the Court of Criminal Appeals say:

"So we believe, looking at the record in this case, that the most that can be said is, that while in the selection of the jury the negro race may not have been accorded its full pro rata with the white race, this was a mere irregularity; and the evidence does not show that the negro race was intentionally of otherwise discriminated against in the selection of said grand and petit jurors. We accordingly hold that there was no error in the action of the district judge in overruling appellant's motions."

It is well settled under the laws of Texas that where, on the question of the impartiality of a jury, there is evidence tending

to show prejudice against the defendant, and other evidence denying same, it is a question for the judge to decide as to the fairness of the jury or members of the jury; and where it does not clearly appear that he has abused his discretion his findings will not be disturbed.

Allen vs. State, 70 S. W. Rep., 85.
Monroe vs. State, 23 Texas, 210.
Nash vs. State, 2 Texas App., 362.
Hawkins vs. State, 27 Texas App., 273.
Shaw vs. State, 32 Texas Cr. Rep., 155.

THE RECORD IN THIS CASE DOES NOT SHOW THAT THE NEGRO RACE WAS INTENTIONALLY OR OTHERWISE DISCRIMINATED AGAINST IN THE SELECTION OF GRAND AND PETIT JURORS, AND, THEREFORE, PLAINTIFF IN ERROR DOES NOT SHOW THAT HE WAS DENIED THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT.

Upon the motions to quash the indictment and special venire, two of the jury commissioners were called as witnesses and testified:

J. H. Rothwell: I was one of the jury commissioners at the October term of court and one of the commissioners who drew the grand jury for the term. I remember that one negro was drawn and placed upon the grand jury. One negro was also drawn for each week for the petit jury. We had so many to draw from who had never served before, and we had to put on at least one negro according to law. We took those who were qualified; those who had paid their poll tax. Some one of the jury commissioners would know the negroes and we took them on when we knew they were qualified. We had more white men that we wanted on, but we took the whole batch together and when we came across negroes we thought good men we put them on. According to law and the way the judge charged us we were required to put on colored men. We did not give white men the preference over negroes. There wasn't any preference, that wasn't considered at all. (Record, pp.

20-23.) We were instructed by the judge before we entered upon our duties not to discriminate against any race or color or nationality, and to consider everybody alike. We did not leave a single negro off simply because he was a negro. In selecting the grand jury our purpose was to get only what we considered the best intelligence and best moral character and fitness for jury service without regard to race or color. (Record, pp. 23-25.)

J. L. Parker: I was one of the jury commissioners for this term of court. I was one of the commissioners who drew the special venire list. We got the names from the poll tax list and the tax roll. We drew some negroes for the regular jury for each week. I don't know how many. The judge charged us not to discriminate against the negro. That is not why we put them on in particular; where we found a good man we put him on wherever we thought he was qualified. We tried to get a jury we thought was qualified. I don't know how many negroes were drawn for the special venire. After the regular list for the term was drawn we drew the special venire. We did not discuss any of them as we were drawing that list. We did not stop to consider at all what proportion were colored and what white. (Record, pp. 25 and 26.) We were instructed by Judge Gillaspie, the judge of this court, before entering upon our duties, not to discriminate against any race or color or any nationality, and we did not do so. We considered whites and negroes alike and tried to draw only such men as we knew would be qualified as jurors. We considered the blacks just the same as we did the whites. The judge of this court instructed us that in selecting the jury, if we found any good negro jurors to put them on, and we followed those instructions. We did not leave off any negro at all whose name we came across because he was a negro. We gave them exactly the same consideration as we did the white man. (Record, pp. 26 and 27.)

A. R. Anderson, sheriff of Harris county, when called by the defendants as a witness, testified:

The population of Harris county is approximately eighty thousand or ninety thousand; about ten or twelve per cent of the population are negroes, or persons of African descent. There are about twelve thousand voters in Harris county, and about eight or ten per cent of those voters are negroes, or persons of African descent. (Record, pp. 10 and 14.) As many as two or three negroes have been drawn as jurors for each week for the past six

or seven years. I always summon negroes along with white men whenever they are drawn. (Record, pp. 15 and 16.)

H. Albrecht, clerk of the district court, called by the defendant as a witness, testified:

I suppose the negro population of Harris county is about fifteen to twenty-five thousand. There are about twelve to fifteen thousand qualified voters; about ten per cent of the voters are negroes. (Record, pp. 17 and 18.)

J. B. Parker, deputy sheriff of Harris county, called by the defendant as a witness, testified:

I have been deputy sheriff a little over fifteen years. The most of the time in the criminal court. I have been serving as deputy sheriff in the criminal district court, Harris county, for the last six or seven years. As many as two and I think one week there were three negroes who served on juries at the respective terms of the criminal court. (Record, p. 32.) The population of Harris county I should judge to be from seventy to eighty thousand; about ten, twelve to fifteen per cent are negroes. (Record, p. 34.)

C. N. Love, called as a witness by the defendant, testified:

My business is editing and publishing a paper. It is published in the interest of the colored people. The colored population of Harris county consists of about twenty per cent or twenty-five per cent of the whole population of the county; about twenty per cent are qualified jurors. (Record, p. 37.)

J. K. P. Gillaspie, judge of the court in which the plaintiff in error was indicted and tried, testified:

I have always instructed the jury commissioners to select qualified men. Those they know and have knowledge from the records have the requisite qualifications for service as jurors without any discrimination whatever as to race or color. That has been my invariable rule and in this particular instance I remember telling the jury commissioners not to discriminate against any man, otherwise qualified, on account of his race, color or previous condition of servitude; that in the event they should do so, their selection would be null and void. I have even gone further than that and instructed them that wherever they found good people, who were qualified under the laws of this State, to select them, irrespective of race or color; that in case they were of the colored race it would tend to make them better citizens and show them that they had some interest in the execution of the laws of their country. I want

to say this: That since I have been judge of this court I have been surprised to find men who have been summoned to serve as jurors who could neither read nor write. This is especially true I know as to colored men as to being qualified to serve on the regular jury. I have never failed to appoint a colored man as a jury commissioner simply because he was colored. I believe in giving them representation as near as I possibly can. In selecting them I used my knowledge of men who had the requisite qualifications and from the very best element of society. (Record, p. 51.)

It is not contended that there is anything in the machinery—that is, the laws of the State of Texas regulating jury trials and the selection of juries—which discriminates between the races. The contention made is that the officers of the State, in the administration of those laws, did in fact discriminate against the negro race, and excluded persons of African descent from the grand jury that found the indictment against plaintiff in error and the petit jury that tried him, because of their race and color, in violation of the rights and immunities guaranteed to him under the Constitution and laws of the United States. We submit that such contention does not find support in the record. On the contrary, the record shows that the jury commissioners fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists. The method of selecting grand jurors under the laws of Texas is through commissioners appointed by the district judge. These commissioners select the grand jurors from the body of the county, based upon their knowledge of the men selected. Said grand jurors must be citizens of the State and of the county in which they are to serve, and qualified under the Constitution and laws to vote in said county. They must be freeholders within the State or householders within the county, and besides they must be of sound mind and of good moral character; and able to read and write. (White's Code of Criminal Procedure, Art. 378.) From the sixteen selected by the commissioners, twelve are empaneled as a grand jury by the district judge at the convening of each term of court. The special venire is drawn from the entire jury for the term, the names being placed in a box and drawn therefrom by the clerk; the number required by the court in each case, when so drawn, constitutes the special venire in such case. The record in this case shows that one negro was empaneled on the grand jury,

which found the bill of indictment against plaintiff in error. It further shows that no negro was drawn on his special venire. The fact that no juror of the negro race was drawn on plaintiff in error's jury was merely accidental, as such jury was drawn from the jury list for the term of the court which contained from one to three negroes for each week of the term. Besides, we do not understand the rule to be that in a criminal prosecution of a negro for crime a mixed jury, some of which shall be of the same race with the accused, can be demanded in any case. A jury of that character is not guaranteed by the Fourteenth Amendment. What an accused is entitled to demand under the Constitution and laws of the United States is that, in organizing the grand jury, as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race and color. While it appears that no negro was placed by the judge upon the jury commission in this case, yet it can not be said that in this omission there was any intentional discrimination on the part of the judge; especially since he instructed the jury commissioners in the selection of jurors not to discriminate against the negro race. Two of the jury commissioners were put upon the stand and both testified that they were instructed by the judge of the court before entering upon their duties not to discriminate against the negro race in the selection of jurors, and that they did not do so. Commissioner Rothwell testified that whenever they came across a negro they thought was a good man, they put him on; that they considered the matter, and according to law and the way the judge charged them, they put on colored men; that they did not leave any persons off because they were negroes; that as to the white men they knew them to be qualified before they put them on; that they did not discriminate the white man from the negro as a man, and that they only put negroes on whom they knew were qualified, and the same with white men. (Record, pp. 20-25.) Commissioner Parker testified that they were instructed not to discriminate against any race or color in the selection of jurors, and that they did not do so. He further testified that they considered whites and negroes alike and tried to draw only such men as they knew would be qualified as jurors; that they did not leave off any negro at all whose name they came across because he was a negro, and that they gave them exactly the same consideration as they did the white men. (Record, pp. 25-27.)

Upon the courts of the State, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution and laws of the United States. The record in this case shows that there was an honest effort not to discriminate against the colored race and not to deny to plaintiff in error any right to which he was entitled, either under the Constitution and laws of Texas or of the United States; but, on the contrary, it shows an honest endeavor on the part of the officers of the State charged with the administration of the criminal laws to discharge their duty. An examination of the decisions of the Court of Criminal Appeals of Texas, wherein the question of race discrimination was an issue, will conclusively show that such court has not hesitated to follow the decisions of this court in such cases, and to accord to colored persons being prosecuted for crime every right to which they are entitled under the Constitution and laws of the United States. (Whitney vs. State, 42 Texas Cr. App., 286; Kipper vs. State, 42 Texas Cr. App., 616.)

In Whitney's Case, *supra*, the court say:

"We would remark here that a number of cases involving this question are coming before this court, and we respectfully call the attention of the district judges to this matter, and refer them to the decisions of the Supreme Court of the United States construing the Fourteenth Amendment of the Constitution of the United States. Wherever the Federal question is involved, the Constitution of the United States, as construed by the highest tribunal in the land, is the supreme law, and should be respected and obeyed; and, where the question is made, the fullest latitude should be given in the investigation, and if the evidence shows, on the trial of a negro, that in the formation of either the grand jury or petit jury he was denied the equal protection of the laws, in that negroes were intentionally excluded from such juries, then the indictment should be quashed, or, as the case may be, the special venire set aside; and it will serve no useful purpose to delay the case and send it to this court for review. For the error of the court in refusing to quash the indictment, or to permit a reasonable time for appellant to secure his witnesses to prove the allegation of the motion to quash the special venire, the judgment is reversed and the cause remanded."

Feeling satisfied that there is no error in the judgment of the Texas Court of Criminal Appeals in this cause, we ask that said judgment be affirmed, or the writ of error herein dismissed.

Robert Vance Davidson

Attorney General.

James DuBose Wadhall

Assistant Attorney General.
For Defendant in Error.

APPENDIX A.

Chapter 1 of Title VII of the Code of Criminal Procedure of Texas.

Organization of the Grand Jury.

"Article 372. *Jury Commissioners Shall Be Appointed, and Their Qualifications.*—The district judge shall at each term of the district court appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

"1. They shall be intelligent citizens of the county and able to read and write.

"2. They shall be freeholders in the county and qualified jurors in the county.

"3. They shall be residents of different portions of the county.

"4. They shall have no suit in the district court of such county which requires the intervention of a jury. (Act August 1, 1877, p. 79, par. 4.)

"Art. 373. *Commissioners Shall Be Notified of Appointment, etc.*—The judge shall cause the persons appointed as jury commissioners to be notified by the sheriff or other proper officer of such appointment, and of the time and place when and where they are to appear before the judge.

"Art. 374. *Oath of Jury Commissioners.*—When the persons appointed appear before the judge he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to anyone the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court until after said cause may be tried or continued or the jury discharged.'

"Art. 375. *Shall Be Instructed in Their Duties, Furnished With Room, Stationery, etc.*—The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in

their duties and shall then retire in charge of the sheriff or a deputy sheriff to a suitable room or apartment to be secured by the sheriff for that purpose. They shall be furnished by the clerk with the necessary stationery, and with the names of the persons appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and they shall also be furnished with the last assessment roll of the county.

"Art. 376. *Shall Be Kept Free From Intrusion; Shall Not Separate, etc.*—The jury commissioners shall be kept free from the intrusion of any person during their session, and shall not separate without leave of the court until they shall have completed the duties required of them.

"Art. 377. *Shall Select Grand Jurors.*—The jury commissioners shall select from the citizens of the different portions of the county sixteen persons to be summoned as grand jurors for the next term of the district court.

"Art. 378. *Qualifications of Grand Jurors.*—No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county.

"2. He must be a freeholder within the State or a householder within the county.

"3. He must be sound of mind and of good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation of theft, or of any felony.

"Art. 379. *Names of Grand Jurors Shall Be Returned, How.*—The names of the persons selected as grand jurors by the commissioners shall be written upon a paper, and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper so certified and signed in an envelope, and seal the same and endorse thereon the words, 'The list of grand jurors selected at.....term of the district court,' the blank to be filled by stating the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, and direct the same to the district judge and deliver it to him in open court.

"Art. 380. *Judge Shall Deliver List to Clerk.*—The judge shall deliver the envelope containing the list of grand jurors, as provided for in the preceding article, to the clerk or one of his deputies, in open court, and without opening the same.

"Art. 381. *Oath Shall Be Administered to Clerk, etc., by Judge.*—Before the list of grand jurors is delivered to the clerk, as provided in the preceding article, the judge shall administer to the clerk and each of his deputies, in open court, the following oath: 'You do swear that you will not open the jury lists now delivered to you, nor permit them to be opened until the time prescribed by law; that you will not directly or indirectly converse with any one selected as a juror concerning any case or proceeding which may come before such juror for trial in this court at its next term.'

"Art. 382. *Deputy Clerk Shall Take Same Oath.*—Should the clerk subsequently appoint a deputy, such clerk shall administer to him the same oath at the time of such appointment.

"Art. 383. *When Clerk Shall Open Lists, etc.*—Within thirty days of the next term of the district court, and not before, the clerk or one of his deputies shall open the envelope containing the list of grand jurors, and make out a fair copy of the names of the persons selected as grand jurors, and certify to the same under his official seal and deliver it to the sheriff or his deputy.

"Art. 384. *Mode of Summoning Grand Jurors.*—It shall be the duty of the sheriff or his deputy to summon the persons named in the list at least three days, exclusive of the day of service, prior to the first day of the term of the court at which they are to serve, by giving personal notice to each juror of the time and place when and where he is to attend as a grand juror, or by leaving at his place of residences, with a member of his family over sixteen years old, a written notice to such juror that he has been selected as a grand juror, and the time and place when and where he is to attend.

"Art. 385. *Return of Officer.*—The sheriff or officer executing such summons shall return the list on the first day of the term of court at which such jurors are to serve, with a certificate thereon of the date and manner of service upon each juror, and if any of said jurors have not been summoned he shall also state in his certificate the reason why they have not been summoned.

"Art. 387. *Failure to Select, etc., Grand Jury; Duty of Court.*—If for any cause there should be a failure to select and summon a grand jury as herein directed, or when none of those summoned

shall attend, the district court shall, on the first day of the organization thereof, direct a writ to be issued to the sheriff commanding him to summon any number of persons, not less than twelve nor more than sixteen persons, to serve as grand jurors.

"Art. 388. *When Less Than Twelve Attend, Court Shall Order Others Summoned.*—When a number less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to serve as grand jurors, the court shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve men.

"Art. 389. *When Jurors Shall Be Required to Attend Forthwith.*—The jurors provided for in the two preceding articles shall be summoned to attend before the court forthwith, and shall be summoned in person, but shall not be entitled to service three days before the time they are to attend, as provided in the case of jurors selected by jury commissioners.

"Art. 390. *Sheriff Not to Summon Disqualified Persons.*—The court, upon directing the sheriff to summon grand jurors not selected by the jury commissioners, shall instruct him that he must summon no person to serve as a grand juror who does not possess the qualifications prescribed in Article 378.

"Art. 391. *Court Shall Test Qualifications of Jurors, When.*—When as many as twelve persons summoned to serve as grand jurors are in attendance upon the court, it shall proceed to test their qualifications as such.

"Art. 392. *Shall Be Interrogated Touching Qualifications.*—Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the district judge, or under his direction, touching his qualifications.

"Art. 393. *Mode of Testing Juror's Qualifications.*—In trying the qualifications of any person to serve as a grand juror, he shall be asked these questions:

"1. Are you a citizen of this State and county and qualified to vote in this county under the Constitution and laws of this State?

"2. Are you a freeholder in this State, or a householder in this county?

"3. Are you able to read and write?

"Art. 394. *When a Juror Is Qualified, Shall Be Accepted, etc.*—When, by the answers of the person, it appears to the court that he is a qualified juror, he shall be accepted as such, unless it be shown

that he is not of sound mind or of good moral character, or unless it be shown that he is in fact not a qualified voter.

"Art. 395. *When Not Qualified, Shall Be Excused.*—Any person summoned who does not possess the requisite qualifications shall be excused by the court from serving.

"Art. 396. *Jury Shall Be Impaneled, When, Unless, etc.*—When twelve qualified jurors are found to be present the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular individual presented to serve as a grand juror."

CHAPTER II OF TITLE VIII OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS.

Of the Special Venire in Capital Cases.

"Article 642. *Definition of a Special Venire.*—A 'special venire' is a writ issued by order of the district court, in a capital case, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court in its discretion may order, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected.

"Art. 643. *State May Obtain Order for Special Venire, etc.*—When there is pending in any district court a criminal action for a capital offense, the district or county attorney may, at any time after indictment found, on motion, either written or oral, obtain an order for a special venire to be issued in such case.

"Art. 644. *Defendant May Obtain Special Venire. When.*—The defendant in a capital case may also obtain an order for a special venire at any time after his arrest upon an indictment found upon a motion in writing, supported by the affidavit of himself or counsel, stating that he expects to be ready for the trial of his case at the present term of the court.

"Art. 645. *Order of the Court; Writ.*—The order of the court for the issuance of the writ shall specify the number of persons required to be summoned, and the time when such persons shall attend, and the time when such writ shall be returnable, and the clerk shall forthwith issue the writ in accordance with such order.

"Art. 647. *Manner of Selecting Special Venire.*—Whenever a special venire is ordered, all the names of all the persons selected by the jury commissioners to do jury service for the term at which such venire is required shall be placed upon tickets of similar size and

color of paper, and the tickets placed in a box and well shaken up; and from this box the clerk, in presence of the judge, in open court, shall draw the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the box and attach such list to the writ and deliver the same to the sheriff.

"Art. 648. *In Case No Jurors, or Not a Sufficient Number.*—When from any cause no jurors have been selected by the jury commissioners for the term, or when there shall not be a sufficient number of those selected to make the number required for the special venire, the court shall order the sheriff to summon a sufficient number of good and intelligent citizens, who are qualified jurors in the county, to make the number required by the special venire.

"Art. 649. *Same Subject.*—When from any cause there is a failure to select a jury from those who have been summoned upon the special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury.

"Art. 650. *Service of Writ.*—The sheriff or other officer executing the writ shall summon the persons whose names are upon the list attached to the writ, to be and appear before the court at the time named in such writ, which summons shall be made verbally upon the jurors in person.

"Art. 651. *Return of Writ.*—The officer executing the writ shall return the same promptly on or before the time it is made returnable. The return shall state the names of those who have been summoned; and if any of those whose names are upon the list have not been summoned, the return shall state the diligence that has been used to summon them and the cause of the failure to summon them."

APPENDIX B.

Opinion of the Court of Criminal Appeals of Texas in the Case at Bar.

Henderson, J. Appellant was convicted of the murder of John Blair, and his punishment assessed at death.

The proof, which was uncontradicted, showed that late on the afternoon of October 9, 1905, John Blair and Shropshire were in the town of Spring, Harris county, and started to their home, near Wilburton, some five or six miles north of Spring. There is testimony tending to show that they were drinking some, and that they bought some beer in Spring and carried it with them. Both were riding horseback. That they left Spring late in the afternoon, and pursued their journey homeward in a slow gait. When they had gotten about a mile out of the town of Spring, and some 400 or 500 yards north of the house of appellant, at a point in the Wilburton Road, both men were killed by appellant. Two shots were fired in rapid succession at close range. This was either at nightfall, or directly thereafter. The State's theory is that, on their journey towards home, as they were riding slowly along the road, and about a half mile from Spring, they were overtaken by appellant, who was also riding horseback. He rode along behind them, and finally one of them asked who he was, and he replied, "Marcellus Thomas." They understood him to say, "Dr. Sellars." One of them replied he was not Dr. Sellars, that he was a negro, and they requested him to ride in advance of them instead of behind them. This enraged appellant, and he rode on in advance of them to his house (which was on the road some 400 or 500 yards ahead), procured his shotgun, proceeded up the road, ahead of said parties, and lay in wait for them some 300 or 400 yards north of his house, at a point where the timber approached the road, and, when Blair and Shropshire approached the point on their horses, he shot both of them, firing two shots in rapid succession, one at each, which inflicted mortal wounds, and was the cause of the death of both of said parties. Blair was found some 200 yards from the place where the shooting occurred, and Shropshire was found some 400 or 500 yards distant, south,

towards Spring. Both were taken to Spring on that night, and medical attention given them. Both died in a day or two after the shooting. Before Blair died he made a dying declaration, which is in accord with the State's theory of the homicide. Appellant's theory is to the effect that he came from Spring late in the afternoon, and, after deceased Blair and Shropshire had left, they preceding him, and having passed Camille Thomas (who lived on the road on the route the parties were traveling) some half an hour before he reached there. That he had an engagement to get a wedge from John Bird, who lived about a mile up the road, in the same direction that said parties were traveling. That, after stopping at Camille Thomas' awhile and conversing, he went on up the road to his own house, got his shotgun, and pursued his journey, in order to get said wedge, which he expected to use the next day. That he overtook Blair and Shropshire along the road, and they accosted him, asked him who he was. He told them he was Marcellus Thomas. They understood him to say, "Dr. Sellars," and told him he was a damn lying son of a bitch, and otherwise abused him, and finally took after him and ran him some 250 yards down the road. He then succeeded in getting into the timber and eluding them. That he remained in the timber some twenty-five minutes, giving them time to get ahead, so that he could proceed after his wedge. That he returned to the road, and in pursuance of his journey came suddenly upon Blair and Shropshire, who had stopped in the road. Blair was off his horse on the ground, and Shropshire was on his horse. They immediately attacked him; Shropshire striking at him, as appellant believed with some weapon, and the other grabbing his bridle reins. Appellant believed that they intended to kill him, and shot the one on the horse first, and then turned his gun on the one who held his bridle reins. That he did not go home that night, but went to Westfield, and stayed all night with a relative, where he was arrested the next morning. This is a sufficient statement of the case in order to discuss the questions raised.

Appellant filed a motion to quash the indictment because he was not given an opportunity to challenge the array of the grand jury, and he also made a motion to quash the indictment on the ground that in the formation of the grand jury, he being a negro, his race was discriminated against in the impanelment of said grand jury. He also filed a motion to quash the special venire, because his race and color were discriminated against in selecting

and drawing said special venire. Under our procedure his motion to quash the indictment, on the ground that he was not afforded an opportunity to challenge the array of the grand jury, is not well taken. Appellant was confined in jail at the time the grand jury was impaneled, and he should have made a request at that time to be brought into court so as to challenge the array. If he failed to make such request, he can not be heard afterwards to complain. Kemp vs. State, 11 Texas App., 174; Brown vs. State, 32 Texas Cr. R., 119, 22 S. W., 596; Barkman vs. State (Texas Cr. App.), 52 S. W., 69. But it seems that, notwithstanding his failure to challenge the array, he can still present his motion to quash the indictment, because his race was discriminated against in the formation of the grand jury which returned the bill. See Carter vs. State, 39 Texas Cr. R., 345, 46 S. W., 236, 48 S. W., 508; Id., 177 U. S., 442, 20 Sup. Ct., 687, 44 L. Ed., 839.

Appellant's motions both to quash the indictment on account of race discrimination and to quash the special venire on the same account are in proper form, and, under the decisions of the Supreme Court of the United States, were made in due time. The court entertained said motions, and heard evidence thereon. According to the evidence, we gather that the population of Harris county is about 90,000, and, of this number, some 70,000 are white and 20,000 are negroes, or of African descent. There are some 10,000 or 12,000 voters in Harris county, and of these from 20 per cent to 25 per cent are negroes; that is, from 3000 to 4000 negro voters. According to some witnesses about 25 per cent, and according to others not over 10 per cent are qualified voters; that is, according to this estimate there are from 300 to 1000 negroes who are qualified to do jury service in Harris county. Our statutes require that at each term of the court the judge shall appoint three jury commissioners for the selection of grand and petit jurors. It is shown that no persons of the negro race have ever been appointed jury commissioners in Harris county. It is further shown that, until within the last four or five years, or until the decision of the Supreme Court of the United States in the Carter Case, supra, and Whitney Case, from Harris county, that no negro grand jurors or petit jurors were drawn in Harris county. That since then, or within the last four or five years, the jury commissioners appointed by the judge were instructed by him not to discriminate against the negro race in the selection of jurors. The testimony tends to show that, as a rule, one member of the negro

race was drawn for service on the grand jury, and from one to two or three negroes were drawn for service on each week of the petit jury. The method of selecting grand jurors under our law is through the commissioners appointed by the district judge, and is covered by Article 378, Code Cr. Proc., 1895. These commissioners select the grand jurors from the body of the county, basing their selection on their knowledge of the men selected. Said grand jurors must be able to read and write, and must be of good moral character; and, besides, qualified citizens of the State and of the county, and qualified to vote in said county, must also be freeholders within the State or householders within the county. From the sixteen selected by the commissioners, twelve are ultimately impaneled as a grand jury by the district judge at the convening of each term of the court. As to the special venire, it is drawn from the entire jury for the term; the names being placed in a box and drawn therefrom by the clerk. The number required by the court, when so drawn, constitutes the special venire in each case. It is shown that, under the plan pursued, one negro was impaneled on the grand jury, which found the bill of indictment against appellant. It is further shown that no negro was drawn on his special venire. There is a good deal of testimony in the record tending to show that negroes, as a general rule, were not as well qualified to sit on juries as persons of the white race, either lacking in sufficient intelligence or from a want of morals. Besides this, there is a good deal of testimony in the record showing who are exempt from jury service, under Article 3142, Sayles' Ann. Civ. St., 1897. Among these are all persons over 60 years of age—ministers of the gospel, engaged in the discharge of their duties, and physicians, attorneys, publishers of newspapers, schoolmasters, druggists, undertakers, etc. From the testimony in regard to these exemptions it would appear that a greater pro rata of negroes are exempt than of the white race.

Two of the jury commissioners were placed on the stand, and we quote from their testimony. Rothwell testified he was a commissioner at said term and remembered of one grand juror being drawn who was a negro, and that they drew one negro petit juror for each week of the term. He was asked why there was but one drawn for each week, and replied, "We had so many to draw from who had never served before, and we had to put at least one negro on according to law." That, whenever they came across a negro they thought was a good man, they put him on. That they con-

sidered a number of negroes, did not know how many, and agreed to put one on the petit jury. That they considered the matter, and, according to law and the way the judge charged them, they put on colored men. That they did not leave any persons off because they were negroes. That, as to the white men, they knew them to be qualified before they put them on, and that they did not discriminate the white man from the negro as a man. That we only put negroes on whom we knew were qualified and the same with the white men. J. L. Parker testified that he was a jury commissioner; that they drew some negroes; that they considered negroes where they knew them, along with white persons, for jury service; that they tried to get a qualified list of jurors; that he did not know for certain whether or not there was a negro drawn on the grand jury. We understand the rule to be, under the decisions of the Supreme Court of the United States, construing the Fourteenth Amendment, that while a negro charged with crime is not entitled to a negro jury, or to a mixed jury, yet the Constitution guarantees him against any discrimination against the negro race, in the selection of a jury by whom he is to be tried. Carter vs. State, 39 Texas Cr. R., 345, 46 S. W., 236, 48 S. W., 508, and authorities there referred to. So the question for our consideration is whether or not, under the facts as here presented, there was discrimination against the negro race in the formation of either the grand jury which indicted appellant, or in the selection of the petit jury which tried him. We take it there is nothing in the machinery—that is, the laws of the State of Texas, regulating jury trials and the selection of juries—which discriminates between the races. But the contention here is that, in the administration of said laws, there was such discrimination. While it appears that no negroes were placed by the judge on the jury commission, yet we do not see in this omission any intentional discrimination on the part of the judge, especially in view of the fact that he instructed these jury commissioners, in the selection of jurors, not to discriminate against the negro race. From the testimony of the commissioners it will be seen that, in the selection of both the grand and petit juries, they had this in mind, and they endeavored to comply with the injunction of the court in this respect. It will be seen from the record that with them it was a matter of difficulty to determine, on the basis of a pro rata representation as between the whites and negroes, what pro rata of negroes were qualified as jurors. While there might be a dis-

crimination against the negroes, even in the adoption of the pro rata, yet we think that is ordinarily a good test. We are not prepared to say that, considering the testimony as to negroes qualified, and the evidence regarding exemptions, the jury commissioners did not, in the selection of both the grand and petit jurors, allow the negro race their pro rata of qualified jurors; that is, one-twelfth on the grand jury, and about the same per cent on the petit jury. The fact that no juror of the negro race was drawn on appellant's jury was merely accidental, as those lists are drawn from the jury list for the term of the court which contained from one to three negroes for each week of the term. These were placed in a box along with white jurors, and as it happened none of them were drawn out. Of course, this could not be regarded as a discrimination. It may be that the jury commissioners did not give the negro race a full pro rata with the white race in the selection of the grand and petit jurors in this case. Still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. We understand the rule to be that mere error in administering the criminal law of the State, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and statutes regulating its jurisdiction. Gibson vs. Miss., 162 U. S., 591, 16 Sup. Ct., 904, 40 L. Ed., 1075; Andrews vs. Swartz, 156 U. S., 272, 15 Sup. Ct., 389, 39 L. Ed., 422; Bergemann vs. Backer, 157 U. S., 655, 15 Sup. Ct., 727, 39 L. Ed., 845. So we believe, looking at the record in this case, that the most that can be said is that while, in the selection of the jury, the negro race may not have been accorded its full pro rata with the white race, this was a mere irregularity, and the evidence does not show that the negro race was intentionally or otherwise discriminated against in the selection of said grand and petit jurors. We accordingly hold there was no error in the action of the district judge in overruling appellant's motions.

In this connection we notice that appellant reserved a bill of exceptions to the action of the court refusing testimony tending to show negroes were excluded from voting in the Democratic primary, and that the Democrats elected the officers of the county, and these were instrumental in operating the machinery of the

court, which excluded negroes from serving on the juries. The court admitted some testimony on this line, but subsequently rejected further testimony. However, we understand that the proof introduced merely showed that the negroes, if they were Democrats, were allowed to vote in the primary, but not otherwise. Negroes were not actually excluded because they were negroes, but because they were Republicans. It does not occur to us that, if appellant could have proven what he stated he expected to prove, this testimony could be regarded as material.

Appellant filed a motion for continuance on account of the absence of Anne Thomas and Elijah Robbins. The application shows that Anne Thomas was temporarily residing in Hardin county, and process was issued for her to that county. Robbins was a resident of Harris county, and process was issued for him to said county. We do not believe diligence was sufficient as to either of said witnesses. It appears that the case was called for trial on January 19, 1906. Process was issued for these witnesses on December 13th, preceding. As to the witness Anne Thomas, the return shows that she was not found in Hardin county, but was supposed to be in Beaumont, Jefferson county. The application itself does not show when this return was made. Nor does the attached process show. Of course, when said return was made, it was the duty of appellant then to have pursued his diligence and have issued process to Jefferson county. An inspection of the application for continuance shows as to the other witness, Robbins, that return was made on December 20th, and no further diligence was shown as to him. Appellant says he expected to prove by the witness Anne Thomas that, on the evening of the homicide, and before it occurred, she was at the home of Camille Thomas, which was situated near the road, along which deceased and his companion passed that evening, and along which Marcellus Thomas also traveled. According to the State's theory, Marcellus Thomas overtook the parties before they reached said Camille Thomas' house, and the first altercation occurred, after he had overtaken them and before they reached Camille Thomas' house. After this altercation, he left said parties, riding on ahead to his own home, got his gun, then went up the road ahead of deceased and his companion, and lay in wait and slew them. According to appellant's theory, he did not overtake the parties until after they passed Camille Thomas' house, and not until he went from there to his own house and got his gun, and

had started up the road after his wedge; that he overtook them for the first time then, and had an altercation with them, in which they assaulted and pursued him some distance. He got out of their way, went into the woods, subsequently returned to the road, still going after his wedge, when he overtook the parties again, and they again attacked him, and he slew them in self-defense. Now, it seems that appellant expected to prove by witness Anne Thomas, in accordance with his theory, that the parties (deceased and his companion) passed Camille Thomas' house ahead of him, and some fifteen or twenty minutes before he arrived; that he did not have any gun at that time; that when said parties passed Camille Thomas' they were in a state of intoxication, using loud and boisterous language along the road; that after said parties passed Camille Thomas' house they had ample time to have gotten beyond Marcellus Thomas' house at the gait they were traveling; and that Marcellus Thomas could not have overtaken them, unless they had dallied along the way. In effect the same facts, it is alleged, appellant expected to prove by Elijah Robbins; that is, he lived along the road where the parties traveled on that evening, and he saw Blair and Shropshire pass his house, going from the town of Spring in the direction of their home at Wilburton, along the traveled route; that they were then in a state of intoxication; that, subsequent to their passing, Marcellus Thomas came past his house and stopped and talked with him; that he had no gun at that time in his possession; that he left there, stating that he was going to John Bird's to get a wedge on that evening to be used early the next morning; and that, if said parties (deceased and his companion) had traveled toward their home in the ordinary gait, Marcellus Thomas could not have overtaken them before they passed up the road beyond John Bird's house, or the point where the killing is alleged to have occurred. Appellant proved the same facts in effect by other witnesses besides himself. To our minds it is not a material circumstance whether appellant caught up with deceased and his companion before they reached Robbins' house or Camille Thomas' house, or afterwards. So far as the testimony of the State is concerned, we do not recall that it fixes any particular point along the road where the first meeting of the parties occurred. As stated, we regard it as immaterial whether appellant overtook deceased and his companion before they passed Camille Thomas' house or afterwards, and it is immaterial as to appellant having his gun. The State's theory is that he did not

have it when he first overhauled the parties. As to the parties drinking that evening, the testimony of the State shows that they were indulging in intoxicating liquor. None of these witnesses pretend to know anything about what occurred when the parties met at the scene of the homicide. It occurs to us that, aside from the want of diligence, and aside from the fact that appellant used a number of witnesses to prove the same facts which he expected to prove by the absent witnesses, this testimony was not of that material character which would cause a reversal.

Appellant complains of the admission of the dying declarations of deceased, John Blair, proved by the witness John Eads. The proposition advanced by appellant is to the effect that the predicate was not sufficiently laid by this witness. It will be seen from an inspection of the record, that deceased in the morning made some expressions indicating that he expected to get well, but in the afternoon, between 2 and 3 o'clock, he declared that he was going to die and could not live, and died about 12 hours thereafter. We do not believe the record affords any circumstances indicating that he was not in his right mind. On the contrary, it affords evidence that he was. The fact that he did not declare when he was going to die, we think, was immaterial under the circumstances. He claimed to be suffering from his wound. He had evidently changed his mind, as expressed in the morning, as to his condition, and stated he was going to die and could not live, evidently referring to his then condition, and to the fact that the wounds he had received would cause his dissolution. We think, under the circumstances, this was a sufficient predicate to indicate that he was then conscious of approaching death under all the circumstances which surrounded him when he made the expression. Connell vs. State, 81 S. W., 746; 10 Texas Ct. Rep., 890; Sims vs. State, 36 Texas Cr. R., 154, 36 S. W., 256; King vs. State, 34 Texas Cr. R., 228, 29 S. W., 1086.

The charge of the court on murder in the second degree is excepted to. The ground of objection to this charge is that it did not tell the jury that a killing must be unlawful in order to constitute the same murder upon implied malice. We do not agree with this contention. Malice and implied malice had previously been defined by the court, and in this charge the jury were instructed, if they believed appellant shot and killed deceased, with implied malice as before defined and explained, to find him guilty of murder in the second degree.

Appellant also complains of the court's charge on manslaughter, in that the court neglected to charge the jury affirmatively as to what facts would constitute adequate cause. We do not understand that there was any proof of any character of "adequate cause," as defined by statute. The court was, therefore, not required to charge on this phase of the case, as insisted by appellant. The court defined "adequate cause" under the statute, and authorized the jury to consider what occurred at the time, and also all the facts and circumstances bearing on the provocation, and, if from all these facts and circumstances they believed there was adequate cause, etc., and defendant's mind was excited by passion, and he killed on this account, to find him guilty of manslaughter. We think, under the circumstances of this case, the court was not required to instruct the jury further than was done.

In this connection it is also insisted that the court should have instructed the jury on cooling time, inasmuch as the testimony both for the State and the defendant showed that there were two difficulties or altercations between the parties; one shortly preceding the fatal encounter. According to the State's evidence, this first altercation consisted of insulting words and conduct by deceased and his companion to appellant. They told him he was a negro, and was not the man they understood he purported to be, and requested him to ride ahead. This could not be considered sufficient provocation to constitute adequate cause, if the homicide had occurred at that time. According to appellant's theory, they attempted to make an attack, he fled, and they pursued him some 250 yards. He further stated, at the time of the fatal encounter, they made a second attack on him, and were assaulting him, as he believed, with deadly weapons, and that he slew them in self-defense. Suppose that he shot too hastily, and he really did not act in self-defense, but was excited by what had occurred before, and their attitude then, this might be manslaughter. And yet we see no necessity for the court to have charged on cooling time, or to have defined cooling time on the question of manslaughter. The jury were instructed, in accordance with the statute, that the provocation must occur at the time, but that they should look to all the facts and circumstances in order to emphasize or intensify the provocation at the time; and, of course, under this they were authorized, if they believed appellant's statement, to look back to the preceding transaction. We understand that the charge of the court fully authorized them to do this. The court distinctly told the jury

to consider all of the facts and circumstances in evidence—the threats—if any, past conduct and bearing of the parties, and all the facts and circumstances transpiring before, at the time of, and after the homicide, in determining the condition of defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition. This instruction, of course, comprehended all that had transpired between the parties on that fatal evening. Appellant's defense of manslaughter was predicated upon his own testimony and the evidence of provocation at the time, testified to by him. The court told the jury that they could consider this, and, in that connection, all of the other facts transpiring between the parties before that. We think that this was sufficient. We do not believe that Brownlee vs. State, 87 S. W., 1153, 13 Texas Ct. Rep., 621, is in point. Some four or five minutes after the altercation, according to the testimony of Brownlee, he renewed the difficulty, and struck deceased with a knife. But here, according to the only testimony of defendant (which was his own), the other parties renewed the difficulty, and gave him the right to act in self-defense. But, as stated, if the jury did not believe this phase of the case, they might regard it as a provocation, and then, according to the court's charge, they could view this provocation in the light of all the facts and circumstances that had transpired before this, which included the alleged altercation and pursuit of appellant by deceased some 25 or 30 minutes previously. Appellant urges the further criticism of said charge that it limited the provocation to the acts of deceased, John Blair, and did not embrace his companion, Shropshire. We do not believe this is well taken. The charge in defining manslaughter tells the jury that the provocation must not be given by any person other than the party killed. However, the charge, in applying the law to the facts, authorized them to view the acts and conduct of both of said parties. We do not believe that the jury were misled by this. Byrd vs. State (Texas Cr. App.), 47 S. W., 721, is not in point. The facts are different. There the court charged distinctly as to an assault made by Alexander himself, omitting any assault by Alexander's wife. Here the court, in applying the law to the facts, does not confine appellant's rights to an assault by deceased alone, but authorized the jury to view all the facts and circumstances in evidence at the time and before. Here, according to appellant's testimony, the parties were acting together and as one on both occasions. If appellant's theory be

correct, both of said parties were assaulting him at the very time of the homicide, and we do not believe that the jury could have been misled by that portion of the instruction which, in defining manslaughter, told them that the provocation must be by the person killed. As stated before, we do not believe it was necessary for the court to group the facts, or tell the jury, further than was done, what constituted "adequate cause." The fact that the court had previously told the jury that an assault and battery, so slight as to show no intention of inflicting pain or injury, would not be adequate cause, did not require the court, on the other hand, to go further and state what character of facts would constitute "adequate cause."

We think the court's charge on self-defense was in accordance with the law on this subject. It distinctly instructed the jury on the basis of danger or appearances of danger from the defendant's standpoint. It further told them that if, from the attack of deceased and his companion, one or both of them, defendant reasonably believed he was in actual or apparent danger, he would not be bound to retreat to avoid the necessity of killing his antagonist, and that he had a right to act on the demonstrations of either or both of them. We think that the charge of self-defense, fairly considered, was adequate and covered every phase of the case as presented by the testimony in that regard.

The court further instructed the jury not to consider any statement made to J. L. Townsend, by appellant, unless the jury should find that he was first warned, and that the same was voluntarily made. This charge properly called the attention of the jury to the matter of appellant's alleged confession, and left the consideration of that matter with the jury as they should find the facts.

We have examined the record carefully, and in our opinion it contains no reversible error. We further believe that the testimony was sufficient to authorize the jury to find the verdict which they did.

The judgment is affirmed.

THOMAS *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS.

No. 6. Argued November 8, 1908.—Decided February 23, 1909.

Where neither the constitutionality of the state statute, nor the interpretation thereof by the state court, is assailed, but the contention is that negroes were excluded from the juries because of their race or color, the question is one of fact, and the decision of the state court is not reviewable by this court under § 709, Rev. Stat., in the absence of such gross abuse as to amount to denial of due process of law.

Discrimination against the accused in the selection of the grand or petit jury cannot be presumed from the mere fact that none of the jurors were negroes or of African descent; and here it appears that a negro was on the grand jury finding the indictment and negroes were on the venire from which the trial jury was drawn, and nothing in the record indicates discrimination.

95 S. W. Rep. 1069, affirmed.

THOMAS was convicted of the murder of John Blair, and his punishment fixed at death. Before arraignment and trial he filed his separate motions to quash the indictment and special venire drawn in this cause, which motions were sworn to, and alleged that "because of the race prejudice and ill feeling against the negroes in Harris County, and against this defendant in particular, on account of his color and race, and because of the sentiment against placing negroes, or persons of color, or of African descent, upon the grand juries and petit juries in said county . . . the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro, or person of African descent, and of the same race and color of this defendant upon said grand jury." It was also alleged that "because of the race prejudice and ill feeling existing against

the negroes or persons of African descent in Harris County, and against this defendant in particular, on account of his color and race, there were no negroes or persons of African descent upon the venire list of persons drawn to serve as jurors in this cause, and that the list of jurors drawn was composed exclusively of white persons, all negroes or persons of African descent having been intentionally excluded and left off of the special venire or list of jurors drawn in this cause by the jury commission because of their race and color." It was further alleged that one-fourth of the qualified jurors of Harris County were negroes or persons of African descent. By agreement and consent of the court evidence was heard upon the two motions at the same time, and considered by the court upon each, the same as if said motions had been heard separately.

Upon considering the evidence on the hearing of said motions, the same were each overruled by the court.

The case was taken on writ of error to the Court of Criminal Appeals, the highest court of Texas for criminal cases, and the conviction affirmed. The action of the trial court in overruling the motions to quash was reviewed by the Court of Criminal Appeals and the rulings sustained. 95 S. W. Rep. 1069. It was then brought here on writ of error.

Mr. Noah Allen and *Mr. Frederick S. Tyler* for plaintiff in error:

Whenever by any action of a State, whether through its legislature, courts, executive or administrative officers, all persons of the African race are excluded, solely because of race and color, from serving as grand or petit jurors in the criminal prosecution of a person of that race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 344; *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565; *Carter* v. *Texas*, 177 U. S. 442; *Martin* v. *Texas*, 200 U. S. 316.

It is admitted that a mixed jury, some of which shall be of

the same race with the accused, cannot be demanded as of right in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment, *Virginia* v. *Rives, supra; Neal* v. *Delaware, supra; Martin* v. *Texas, supra;* but that the accused is entitled to demand, under the Constitution of the United States, that in organizing the grand jury, as well as impanelling the petit jury, there shall be no exclusion of his race, and no discrimination against them because of their race or color, is conclusively settled by the decisions. *Virginia* v. *Rives, supra; In re Wood*, 140 U. S. 278, 285; *Martin* v. *Texas, supra; Farrow* v. *State*, 45 So. Rep. 619; *Montgomery* v. *State*, 45 So. Rep. 879.

Mr. Robert Vance Davidson, Attorney General of the State of Texas, and *Mr. James DuBose Walthall*, for defendant in error:

The trial court having permitted plaintiff in error to introduce evidence and offer proof in support of his motion to quash the indictment and special venire drawn in his case, and having considered said evidence and overruled the motion upon the ground that no discrimination against him was shown, and the Court of Criminal Appeals, the highest court in Texas in criminal cases, after a full review of the testimony, having decided that the trial court acted properly in overruling said motion, such ruling will not be disturbed by the Supreme Court of the United States upon writ of error. *Barrington* v. *Missouri*, 205 U. S. 484; *Allen* v. *State*, 70 S. W. Rep. 85; *Monroe* v. *State*, 23 Texas, 210; *Nash* v. *State*, 2 Texas App. 362; *Hawkins* v. *State*, 27 Texas App. 273; *Shaw* v. *State*, 32 Texas Cr. Rep. 155.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

It is not contended that the laws of Texas, under which grand and petit juries are selected, are in themselves discriminating and in violation of the Constitution of the United States. It is admitted by plaintiff in error that neither the constitution nor statutes of Texas prescribed any rule for, or mode of procedure

in, the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the State without regard to race, color, or previous condition of servitude. Nor is it contended that the constitution and laws of the State had, at the time this prosecution was instituted, been so interpreted by the courts of Texas as to prevent the enforcement of rights secured equally to all citizens of the United States without regard to race or color. The only contention was that the jury commissioners in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error did in fact exclude therefrom negroes or persons of African descent, because of their race and color. This was a question of fact, and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts.

In the case of *In re Kemmler*, 136 U. S. 436, 449, it was intimated that if the highest court of a State "had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States," this court might take jurisdiction, but the occurrence of such an instance was not suggested as probable.

In *Barrington* v. *Missouri*, 205 U. S. 483, 484, the plaintiff in error, before the trial of the cause commenced, applied for a change of venue on the ground of local prejudice. Upon the hearing of the application many witnesses were examined and testified, and the trial court decided that prejudice justifying a change of venue had not been made out and denied the application. In dismissing the writ of error in the above case we said:

"It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he was entitled. The state Supreme Court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and 'that

where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as to indicate an abuse of the discretion lodged in such court.' And the Supreme Court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary."

It was ruled in *Martin* v. *Texas*, 200 U. S. 316, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, and that an accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race. And it was said "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the impanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise dis-

criminated against in the selection of the grand and petit jurors. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box. The court said:

"It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. We understand the rule to be that mere error in administering the criminal law of the State, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction."

No other point requiring consideration, the result is

Judgment affirmed.

END OF CASE